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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ARTHUR A. COIA
ARTHUR E. COIA
ALBERT J. LEPORE and
JOSEPH J. VACCARO, JR.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the RICO conspiracy crime created by 18 U.S.C. § 1962(d) requires proof of an overt act as an essential element of the offense?

2. Whether a judicial presumption that a conspiracy continues to exist until there has been an affirmative showing by the accused that it has terminated violates due process of law, the presumption of innocence, the burden of the prosecution to prove guilt beyond a reasonable doubt and the privilege against self-incrimination and conflicts in principle with the Supreme Court's decision in cases such as Mullaney v. Wilbur, 421 U.S. 684, 685 (1975)?

3. Whether a judicial presumption that a conspiracy itself continues to exist until there has been affirmative showing by the accused that it has terminated conflicts in principle with

the Supreme Court's decisions in Hyde v. United States, 225 U.S. 347, 367-72 (1912) and in United States v. Kissel, 218 U.S. 601, 607-08 (1910), which suggests a requirement of actual proof of "continuous co-operation" or continued "efforts in pursuance of the plan?"

4. Whether the bar of statutes of limitations such as 18 U.S.C. § 3282 prohibiting trial for an offense unless an indictment is found within a set period of time after the offense is "committed" can be circumvented by a judicial presumption that the crime continues although no evidence of it exists and no act is committed which manifests that a criminal agreement is at work?

5. Whether all federal courts should be bound by the modern, majority rule of criminal pleading which demands

that an accusation be dismissed when it does not allege facts on its face showing that the alleged criminal conduct is not barred by the statute of limitations?

6. Does a federal trial court have the power and discretion pretrial to inquire beyond the face of a criminal accusation in order to determine a statute of limitations question or must it wait through a lengthy trial before deciding that prosecution was barred in the first place?

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioners, Arthur A. Coia, Arthur E. Coia, Albert J. Lepore, and Joseph J. Vaccaro, Jr., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is reported at 719 F.2d 1120 (11th Cir. 1983) and is reproduced at App. 129.

JURISDICTION

The opinion of the Court of Appeals was filed November 17, 1983, and a petition for rehearing was denied January 20, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

18 U.S.C. § 1954 provides as follows:

Whoever being--

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

(2) an officer, counsel, agent, or employee of an employer or an employer of any of whose employees are covered by such plan; or

(3) an officer, counsel, agent, or employee or an employee organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan

receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited

by this section, shall be fined not more than $10,000 or imprisoned not more than three years, or both: Provided, That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As used in this section, the term (a) "any employee welfare benefit plan" or "employee pension benefit plan" means any employee welfare benefit plan or employee pension benefit plan, respectively, subject to any provision of title I of the Employee Retirement Income Security Act of 1974, and (b) "employee organization" and "administrator" as defined respectively in sections 3(4) and (3)(16) of the Employee Retirement Income Security Act of 1974.

18 U.S.C. § 1961 provides in pertinent part:

As used in this chapter --

(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1954 (relating to unlawful welfare fund payments) . . .;

* * *

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of any prior act of racketeering activity;

18 U.S.C. § 1962(c) provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 3282 provides:

> Except as otherwise expressly provided, by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Rule 2 of the Federal Rules of Criminal Procedure provides:

> These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 12(a) of the Federal Rules of Criminal Procedure provides:

> Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment

> and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

Rule 12(b) of the Federal Rules of Criminal Procedure provides in pertinent part:

> Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:
>
> (1) Defenses and objections based on defects in the institution of the prosecution; or
>
> (2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections

> shall be noticed by the court at any time during the pendency of the proceedings);

Rule 17.1 of the Federal Rules of Criminal Procedure provides in pertinent part:

> At any time after the filing of the indictment or information the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial.

Rule 57(b) of the Federal Rules of Criminal Procedure provides in pertinent part:

> Procedure Not Otherwise Specified. If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

STATEMENT OF THE CASE

On September 23, 1981, a federal grand jury in the Southern District of Florida charged the four petitioners

and one other defendant in a one-count indictment, alleging that they had conspired to engage in labor racketeering, in violation of 18 U.S.C. 1962(d).* Prior to the trial, the petitioners filed motions to dismiss the indictment, claiming in part that the indictment was not brought within the statute of limitations period. The magistrate recommended that the motion be granted, and after oral argument on the motion, the district court adopted the magistrate's recommendation and ordered the indictment dismissed as to all four petitioners. The government then took an appeal pursuant to the Criminal Appeals Act, 18 U.S.C. § 3731. A panel of the United States Court of Appeals for the Eleventh Circuit reversed. The four petitioners have joined in the

*The fifth defendant was severed by the district court and is not a party to this appeal.

instant petition for a writ of certiorari seeking review of that decision.

STATEMENT OF THE FACTS

1. The Indictment.

The indictment in this case alleges that the five petitioners conspired to use their influence over the Laborers International Union of North America and its subordinate bodies and affiliated employee benefit plans in ways forbidden by 18 U.S.C. § 1954 (App. A-1)(1 R. 1-11).* According to the indictment, the conspirators funneled the union's insurance and service business into insurance and service companies they had set up, and then charged the union members for the most expensive form of insurance. The conspirators then looted the insurance premiums and used the proceeds for kickbacks, payoffs, un-

*"R." refers to the 11-volume record on appeal.

earned salaries and fees, and improper personal expenses (Indictment ¶4).

Part of the conspiracy, the indictment charges, was an agreement among conspirators to obtain kickbacks in return for giving the union's insurance business to one Joseph Hauser and companies controlled by him. In order to facilitate the payment of the kickbacks, the conspirators set up several companies to serve as "conduits" for the kickbacks. The Northeast Insurance Agency, Inc. (Northeast) was set up as a conduit for the payments of kickbacks from Hauser to petitioners Arthur A. Coia and Arthur E. Coia (father and son) and to petitioner Albert J. LePore (Indictment ¶11). National Group Insurance Agency, Inc. was set up as a conduit for the payment of kickbacks from Hauser to the severed defendant

and petitioner Joseph J. Vaccaro, Jr. (Indictment ¶10).

The indictment further alleges that the petitioner Arthur E. Coia agreed to provide Hauser with inside information regarding the awarding of insurance contracts with certain of the Union's employee benefit plans and to use his influence to ensure the award of those contracts to one of Hauser's companies (Indictment ¶12). Finally, the indictment charges that the petitioners agreed to support the kickback scheme (Indictment ¶14) and to take steps to hide and conceal the purpose of the conspiracy and the acts committed in furtherance of the conspiracy (Indictment ¶15).

The indictment alleges that the conspiracy continued from 1973 until "in or about December 1977" (Indictment ¶3). In addition, the indictment lists 28

overt acts allegedly committed by the conspirators between 1973 and October 19, 1976, in furtherance of the conspiracy. These overt acts include an initial meeting between petitioner Arthur E. Coia and Joseph Hauser in 1973 (Overt Act 1); Arthur E. Coia's receipt of periodic payments of approximately $5000 between March 1974 and June 1976 (Overt Act 3); a meeting of petitioners Vaccaro, the severed defendant, and petitioner Arthur E. Coia with Hauser in 1974 (Overt Act 5); a meeting between petitioner LePore and Hauser in January 1976 (Overt Act 13); and the receipt of a $50,000 payment from Hauser by petitioners LePore and Arthur A. Coia in February 1976 (Overt Act 14). The indictment also alleges that during 1976, various petitioners took steps designed to further the conspiracy by directing insurance business to Hauser's

companies and by receiving substantial payments directly or indirectly from Hauser (Overt Acts 16-25). Overt Act 28, the last overt act listed in the indictment, charges that on October 19, 1976, petitioner LePore wrote a check for $2000 to himself out of funds provided in part by Hauser (Overt Act 28). The date of that overt act, which is alleged to have been committed in furtherance of the conspiracy, fell within the five-year period preceding the return of the indictment.

2. The Magistrate's Report.

Prior to trial, the petitioners moved to dismiss the indictment on various grounds, including the statute of limitations (2 R. 226; 3 R. 278; 5 R. 790-803; 8 R. 1363-1372, 1400-1409). After the government responded (7 R. 1128-1137), the district court referred the motion to a magistrate for a report.

In a six-page report, the magistrate recommended that the indictment be dismissed (App. A-27)(8 R. 1316-1321).

The magistrate first concluded that a RICO conspiracy charge requires the government to prove an overt act in furtherance of the conspiracy, although the statute does not expressly refer to any overt act requirement (8 R. 1317). The magistrate then ruled that because the statute requires proof of an overt act, the indictment must allege an overt act within the statute of limitations period in order to survive a motion to dismiss on statute of limitations grounds (8 R. 1318). Because Overt Act 28 is the only overt act alleged in the indictment that clearly falls within the limitation period, the magistrate then addressed the question whether the allegations in Overt Act 28 are sufficient to withstand the petitioner's

motions to dismiss on statute of limitations grounds.

Overt Act 28, the magistrate noted, alleges that on or about October 19, 1976, petitioner LePore "wrote a check for $2,000 to himself out of funds provided in part by Joseph Hauser." The magistrate concluded that this act could not be in furtherance of the conspiracy charged in the indictment because it appeared simply to consist of a transfer by LePore of funds that had previously been provided to LePore by Hauser (8 R. 1318-1319). If the purpose of the conspiracy was to obtain money for the petitioners by means of kickbacks from Hauser, the magistrate ruled, "it would seem that the purpose of the conspiracy was complete upon delivery by Hauser of money to the possession or control of LePore. What LePore thereafter did with the funds could not be in furtherance of

the goals of the conspiracy but rather a use of the fruits of the conspiracy" (8 R. 1319). The magistrate therefore recommended that the motion to dismiss the indictment be granted (8 R. 1321).

3. The District Court's Ruling.

The government objected to the magistrate's report and sought a hearing before the district court. At the hearing, and in pleadings submitted to the district court, the government made a three-part argument: (1) that the statute of limitations issue was not appropriate for a pre-trial resolution; (2) that because the RICO statute does not require proof of an overt act, the statute of limitations would be satisfied if the proof showed that the conspiracy continued into the limitations period, even if no overt act were committed during that period; and (3) that even if the RICO statute were

construed to require proof of an overt act, Overt Act 28 in the indictment would be sufficent to bring the indictment within the statute of limitations period (11 R. 4-28).

The government represented at the hearing that the proof would show that the conspirators continued to plan ongoing kickbacks, as part of the original argeement, until well into the limitations period (11 R. 21). Moreover, the government argued that the proof at trial would show that Overt Act 28 was clearly in furtherance of the conspiracy. In particular, the government represented that the proof would show that the account from which petitioner LePore withdrew $2000 for his personal use was one of the "conduit" accounts for transferring money from Hauser to the petitioners (11 R. 24-26). Therefore, the government argued, the

transfer of funds from that account to LePore furthered the conspiracy by disguising the kickback scheme and by serving as a vehicle for distributing the fruits of the conspiracy. The indictment, however, alleged that Northeast served as a conduit for kickbacks (¶1(f) and 11) and, in contradistinction, failed to allege that LePore's own account served as any kind of conduit. Petitioners further introduced evidence to this effect, without objection by the government, showing that the account was an attorney-at-law account and that any funds from Hauser or Northeast had been depleted before LePore wrote the $2000 check to himself.

Following the hearing, the district court entered an order dismissing the indictment (App. A-118)(8 R. 1331-1334). The court agreed with the magistrate that a RICO conspiracy charge

requires proof of an overt act (8 R. 1333). The court then concluded that "the writing of a check by one defendant from his personal account did not advance the purpose of the conspiracy alleged in this case" (8 R. 1333). The act, the court concluded, was not a step in furtherance of the conspiracy, but was merely the use of the fruits of the conspiracy, which is not sufficent to extend the conspirational period (8 R. 1333). The government filed a timely notice of appeal from that order (8 R. 1335).

4. The Court of Appeals' Opinion.

A panel of the United States Court of Appeals for the Eleventh Circuit reversed. (App. 129) 719 F.2d 1120. The majority first stated that the district court did not err in resolving prior to trial the factual issue of whether the conspiracy continued into

the statute of limitations period as alleged in the indictment. Indeed, it twice stated that a pretrial determination was "mandated" by the Federal Rules of Criminal Procedure. 719 F.2d at 1123. Yet, it appeared to limit this determination to review of the facts alleged on the face of the indictment and virtual acceptance of conclusory allegations. 719 F.2d at 1123, 1124. It practically precluded any pretrial evidentiary hearing designed to resolve the statute of limitations problem before completion of the five week jury trial estimated by the prosecution as necessary for its case-in-chief. 719 F.2d at 1125.

Second, the majority held the RICO conspiracy crime created by 18 U.S.C. §1962(d) does not require proof of an overt act as an essential element of the offense. It thus reversed the district

court's dismissal of the indictment because "it was based on an erroneous notion of substantive law." 719 F.2d at 1123; id. at 1125.

Third, the majority stated that a conspiracy which does not require proof of an overt act as an essential element is "deemed to continue as long as its purposes have neither been abandoned nor accomplished," 719 F.2d at 1124, and that such a conspiracy which "'contemplates a continuity of purpose and a continued performance of acts, . . . is presumed to exist until there has been an affirmative showing that it has terminated.'" Thus, the majority reasoned that an indictment satisfies the requirements of the statute of limitations if the conspiracy is alleged, in conclusory fashion, to have continued into the limitations period. 719 F.2d at 1124.

The majority also opined that it doubted the district court could ever hold that the case was time barred. It said that an indictment alleging facts occurring beyond the time period of the statute of limitations but close to that bar "could support an inference that the conspiracy continued into the limitations period." 719 F.2d at 1125. It also referred to the presumption of continued existence. Id. And, it cautioned that "the district court should not require the government to launder its evidence in the presence of the defendant prior to trial." Id.

One judge concurred in everything the majority said but dissented on grounds that the court was bound by the contrary holding in United States v. Phillips, 664 F.2d 971, 1038 (5th Cir. Unit B 1981), cert. denied, 457 U.S. 1136 (1982), which requires proof of an overt act as an essential element of RICO conspiracy.

A timely petition for rehearing and suggestion for rehearing en banc was filed. No judge requested a poll of the circuit judges concerning en banc rehearing. The petition was denied without a statement of reasons. (App. A-148).

REASONS FOR GRANTING THE WRIT

This case presents important, recurring questions of federal law. Federal prosecutors almost automatically add conspiracy charges to accusations alleging federal substantive crimes. RICO charges are often added where formerly other conspiracy charges alone served to enhance the accusation. See generally Tarlow, RICO: The New Darling of the Prosecutor's Nursery, 49 Fordham L. Rev. 165 (1980); Tarlow, RICO Revisited, 17 Ga. L. Rev. 291 (1983). The decision rendered below thus has important practical consequences.

Moreover, the decision below decides federal questions in a way in conflict with applicable decisions of this Court. The federal courts of appeal are also in conflict with one another. In addition, federal criminal pleading practice concerning statutes of limitations appears to be in conflict with the majority rule, reflected in state court practice.

The court below has sanctioned a rule of law in which the existence of a crime is presumed without any evidence manifesting that any act has been committed. It has used this rule of law to subvert the "policy of repose" established by the Congress in statutes of limitations -- a policy this Court has recognized as "fundamental to our society and our criminal law." Bridges v. United States, 346 U.S. 209, 215-16 (1953). Finally, it has combined this

rule of law with an approach to pleading and practice which requires federal courts to engage in lengthy trials before coming to grips with statute of limitations problems -- even though it appears probable that the prosecution should be barred at the threshold by the statute of limitations. Thus, the decision below lost sight of important precedents of this Court, due process of law, the policy of repose and the importance of judicial economy. Certiorari should be granted for this reason and to resolve the confusion which abounds in the areas outlined more fully below.

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT IN THE CIRCUITS OVER THE OVERT ACT REQUIREMENT FOR A RICO CONSPIRACY CHARGE

In reversing the district court's dismissal of the indictment, the court

of appeals held that a RICO conspiracy does not require an overt act and, consequently, overt acts are irrelevant in applying the statute of limitations to RICO cases. The court thus refused to follow several Fifth Circuit RICO cases, ordinarily binding authority in the Eleventh Circuit, indicating that proof of an overt act was required for conviction under 18 U.S.C. § 1962(d). United States v. Phillips, 664 F.2d 971, 1038 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); United States v. Sutherland, 656 F.2d 1181, 1186-87 n.4 (5th Cir. 1981); cf. United States v. Elliot, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

RICO is an extraordinarily broad and far-reaching act whose language has been described as "less than pellucid." United States v. Rubin, 559 F.2d 975 (5th Cir. 1977), vacated, 439 U.S. 810

(1978), rev'd. in part on other grounds, 591 F.2d 278 (5th Cir.), cert. denied, 444 U.S. 864 (1979). In fact, the statute has frequently been attacked as unconstitutionally vague. See, e.g., United States v. Hawes, 529 F.2d 472, 479 (5th Cir. 1976); United States v. Campanale, 518 F.2d 352, 364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); United States v. Parness, 503 F.2d 430, 440-42 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). Much of the confusion surrounding RICO concerns whether a conspiracy charge requires the showing of one or more overt acts done in furtherance of the conspiracy. It is our contention that it does.

While it is true that it is the agreement that is the gravamen of a conspiracy offense, nevertheless it is "conduct, not status" that is punished.

Elliot, 571 F.2d at 903. To be convicted as a member of a RICO conspiracy, "an individual, by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate crimes." Id. (emphasis in original.) Such an agreement is best "objectively manifested" by proof of overt acts done in furtherance of that agreement. Without a requirement of objective proof of a conspiracy to temper a statute as broad and complex as RICO, which covers crimes from mail fraud to murder, the potential for abuse is far too great.

The overt act requirement has produced substantial confusion and conflict among the circuit courts. At least four circuits have endorsed a requirement of one or more overt acts by

one or all of the conspirators; at least three circuits have rejected this view.

The Fourth Circuit, for example, decided that "§ 1962(d) . . . requires two racketeering activities . . . at least two predicate offenses to establish a conspiracy." United States v. Karas, 624 F.2d 500, 503 (4th Cir. 1980), cert. denied, 449 U.S. 1978 (1981). Similarly, the Fifth Circuit, only a month before the Coia decision, affirmed the overt act requirement in that circuit, relying upon the same authority Coia declined to follow: "There must be proof of an illegal conspiracy, defendants' knowing participation and an overt act in furtherance." United States v. Kimble, 719 F.2d 1253, 1256 (5th Cir. 1983) (citing United States v. Phillips, 664 F.2d 971 (5th Cir. 1981). See also United

States v. Starnes, 644 F.2d 673 (7th Cir. 1980), cert. denied, 454 U.S. 826 (1981) (rejecting defendants' argument that the predicate acts upon which their RICO conspiracy conviction was based constituted only one predicate act, rather than the two required by the statute); United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050, reh'g denied, 424 U.S. 950 (1976) (for RICO conspiracy conviction, government must prove that conspiracy was formed for the purpose of conducting an enterprise "through a pattern of racketeering" which, by definition, requires "at least two acts of racketeering activity.").

As noted above, the overt act requirement has also been rejected in some circuits. For example, in United States v. Barton, 647 F.2d 224, 237 (2d Cir.), cert. denied, 454 U.S. 857

(1981), the court stated: "While the general conspiracy statute requires proof of an overt act, the RICO conspiracy section does not." The Eleventh Circuit, of course, has now aligned itself with this view with its decision in this case. See also United States v. Winter, 663 F.2d 1120 (1st Cir. 1981), cert. denied, 103 S.Ct. 1249 (1983) (rejecting contention that each conspirator must commit two or more crimes, but holding that at a minimum, indictment must charge agreement by each conspirator to commit two or more specified crimes.)

Some courts, such as the Eighth Circuit, have simply refused to decide the issue:

> The RICO statute admittedly does not make clear whether each RICO conspiracy defendant must agree that someone in the enterprise will commit two predicate acts, whether each must agree personally

> to commit two such acts, or whether each member must actually commit two such acts. . . . Regardless of the answer to this question, we here find that each appellant did in fact agree personally to commit two such acts and did commit two acts of racketeering

United States v. Lemm, 680 F.2d 1193, 1203 n.11 (8th Cir. 1982), cert. denied, 103 S.Ct. 739 (1983).

Considerations of practical and equitable administration of justice demand that the conflict among the circuits over whether a RICO conspiracy charge requires a showing of overt acts must be resolved. Considerations of fundamental fairness and due process of law demand that the requirement be upheld. For these reasons we urge the Court to grant certiorari to consider and decide this pressing issue.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' PRESUMPTION OF A CONTINUING CONSPIRACY MISINTERPRETS FEDERAL LAW AND CONFLICTS IN PRINCIPLE WITH SUPREME COURT DECISIONS REGARDING PRESUMPTION OF INNOCENCE, ALLOCATION OF BURDEN OF PROOF AND DUE PROCESS OF LAW

The district court, upon motion by petitioners, dismissed the indictment as barred by the statute of limitations, there being no overt act committed in furtherance of the conspiracy during the five year statutory period prior to the indictment. The court of appeals reinstated the indictment, noting that the indictment alleged that the conspiracy continued into the limitations period, that the grand jury had found probable cause to issue the indictment, and, critically, that "a [continuing] conspiracy . . . is presumed to exist until there has been an affirmative

showing that it has terminated." United States v. Coia, 719 F.2d 1120, 1125 (11th Cir. 1983) (quoting United States v. Mayes, 512 F.2d 637, 642 (6th Cir.) cert. denied, 422 U.S. 1008 (1975)). Earlier the court below declared "[t]he conspiracy may be deemed to continue so long as its purposes have neither been abandoned nor accomplished." 719 F.2d at 1124.

This judicial presumption conflicts with basic notions of due process as interpreted by this Court and is founded not upon solid law, but upon a long-standing misinterpretation of a Supreme Court case.

Due process requires that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 364 (1970); Mullaney v. Wilbur, 421 U.S. 684, 685 (1975);

Patterson v. New York, 432 U.S. 197 (1977); Sandstrom v. Montana, 442 U.S. 510 (1979). The government must, in order to convict, prove beyond a reasonable doubt that the alleged conspiracy continued into the five-year period preceding the indictment. Yet the government has alleged no overt acts within this period* and in fact, at a pre-trial hearing, the government was unable to proffer any action by an accused which manifested that the conspiracy still existed within the time period of the statute of limitations. Instead, the government relies upon the bald allegation of a continuing conspiracy and upon the unconstitutional presumption that a conspiracy continues

*One overt act alleged in the indictment (overt act No. 28) fell within the statute of limitations period, but was insufficient on its face to satisfy the requirement that it be in furtherance of the conspiracy. United States v. Coia, 719 F.2d at 1122.

until there has been an affirmative showing by the accused that it has terminated.

In considering the validity of statutory presumptions, this Court has held that there must be "a rational connection between the facts proved and the facts presumed." Leary v. United States, 395 U.S. 6, 33 (1969); Tot v. United States, 319 U.S. 463, 467 (1943). The process of determining rationality "is, by its nature, highly empirical." United States v. Gainey, 380 U.S. 63, 67 (1965). The judicially created presumption imposed by the court of appeals in this case is neither logically sound nor empirically justified. There is simply no foundation, logical or empirical, for the contention that a conspiracy that exists today must be presumed to exist one year from today, one month from today, or even tomorrow. Just as the

creation of a conspiracy cannot, consistent with due process, be presumed without proof, so too is the presumption that a conspiracy once created necessarily continues until the accused shows that it has been terminated a violation of the accused's right to due process of law.

The Court's presumption of a continuing conspiracy is not only constitutionally infirm, but is based on suspect authority as well. An examination of the circuit court's chain of authority for the presumption that a conspiracy continues until there is an affirmative showing that it has been terminated reveals that the idea has evolved from Hyde v. United States, 225 U.S. 347 (1912).* But the language

*The court cites United States v. Mayes, 512 F.2d 637, 642 (6th Cir.), cert. denied, 422 U.S. 1008 (1975), which relies on United States v. Etheridge, 424 F.2d 951, 964 (1970). Etheridge cites Hyde, along with five other cases which also rely on Hyde.

and holding of Hyde have been greatly distorted and misconstrued over the years.

In Hyde, the Court considered the problem of proving membership in a conspiracy that involved not one agreement, but a continuous series of agreements. That a conspiracy could be treated as continuous was decided by United States v. Kissel, 218 U.S. 601 (1910), but that opinion had "nothing to say as to what evidence would be sufficient to prove the continuation of the conspiracy, or where the burden of pleading or proof as to abandonment would be." 218 U.S. at 610.

Nor did Hyde speak to the degree of proof necessary to show that a conspiracy is a continuing one. The evidence of a continuing conspiracy in Hyde was clearly sufficient -- overt acts committed within the statute

of limitations period. One of the conspirators contended, however, that since none of the acts attributed to him had occurred within the three-year period, the statute of limitations barred his conviction. The Court disagreed, holding that if a conspiracy is a continuing one, the relation of the conspirators to it must continue as well, unless a conspirator has withdrawn.

If there is any presumption arising from Hyde, it is that a proven member of a proven continuing conspiracy is presumed to remain a member of that conspiracy until its termination, or until his withdrawal. But over the years this holding has been distorted to variations on the same catchphrase: "a conspiracy once established is presumed to continue until the contrary is established." Coates v. United

States, 59 F.2d 173, 174 (9th Cir. 1932); Accord Marino v. United States, 91 F.2d 691, 695 (9th Cir. 1937); United States v. Etheridge, 424 F.2d 951, 964 (6th Cir. 1970); United States v. Mayes, 512 F.2d 637, 642 (6th Cir. 1975).

This distortion of Hyde appears most often in the context of a withdrawal defense to a conspiracy charge. In United States v. Read, 658 F.2d 1225 (7th Cir. 1981), the court considered the allocation of the burden of proof where a withdrawal defense was asserted. The case law of the circuit placed the burden squarely on the accused, setting up a presumption of a continuing conspiracy. In tracing the authority for this proposition, the court found, as in this case, that all roads lead to Hyde.

Upon re-examining Hyde, the court in Read found that "[t]he withdrawal

rule is based on a misinterpretation of Hyde . . . ." 658 F.2d at 1236. The court, therefore, overruled those cases imposing the burden of proving withdrawal on the accused and held that "it [withdrawal] must be disproved beyond a reasonable doubt by the government"* Id. Parenthetically, the withdrawal defense in Read was asserted by one conspirator, where the continuing conspiracy was amply evidenced by overt acts committed within the statute of limitations period.

In the instant case, the circuit court has seized upon the distorted language eschewed by Read to impose a presumption, not against the withdrawal of a single conspirator from a proven ongoing conspiracy, but in favor of the continuation of the alleged

*The defendant still has the burden of going forward with evidence of withdrawal.

conspiracy itself. The court of appeals has thus taken a catchy misstatement of Hyde's holding regarding the withdrawal of one conspirator from a continuing conspiracy and applied it to an essential element of the larger crime -- the very existence of the conspiracy during the time period not barred by the statute of limitations.

The Constitution requires that the government prove beyond a reasonable doubt every element of the offense charged. This constitutionally mandated requirement cannot be met by a judicial presumption, based not on the sound reasoning of Hyde v. United States, but on the enlarged and distorted shadow that case has cast through the decades, that a conspiracy continues to exist, without proof, until the accused has affirmatively shown its termination.

In addition, the holding in Hyde

itself should be re-examined. We are particularly concerned with the Court's reasoning that if one ever becomes a member of a continuing conspiracy he "necessarily" remains a member during the entire life of the conspiracy. In the words of Mr. Justice McKenna, speaking for five members of the Court:

> Men may have lawful and unlawful purposes, temporary or enduring. The distinction is vital and has different consequences and incidents. The conspiracy accomplished or having a distinct period of accomplishment is different from one that is to be continuous. If it may continue, it would seem necessarily to follow the relation of the conspirators to it must continue, being to it during its life as it was to it the moment it was brought into life. If each conspirator was the agent of the others at the latter time, he remains an agent during all of the former time. This view does not, as it is contended, take the defense of the statute of limitations from conspiracies. It allows it to all, but makes its application different.

225 U.S. at 369 (emphasis added).

This reasoning presumes guilt without requiring proof. It is at odds with more recent cases of this court such as Winship, Mullaney, Patterson and Sandstrom. It not only defies Due Process of law, it also undermines the Fifth Amendment privilege against self-incrimination. As observed, almost gleefully, in one of the cases relied upon by the court below, "strict" affirmative defenses that a conspiracy had been abandoned or that a conspirator had withdrawn are "most difficult for them to prove when, as here, the defendants exercised their right not to testify." United States v. Hamilton, 689 F.2d 1262, 1269 (6th Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 753, 74 L.Ed.2d 971 (1983).

The reasoning in Hyde also appears at odds with this Court's earlier

decision in Kissel. Although Kissel had nothing to say about how or by whom continuation of the conspiracy must be proven, it did say that a continuing conspiracy requires "the continuous co-operation of the conspirators to keep it up" and "continue[d] . . . efforts in pursuance of the plan." In the words of Mr. Justice Holmes, speaking for all the members of the Court,

> It is also true, of course, that the mere continuance of the result of a crime does not continue the crime. United States v. Irvine, 98 U.S. 450. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contem-

> plates that the conspirators will remain in business, and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan, the conspiracy continues up to the time of abandonment or success.

218 U.S. at 607-08 (emphasis added).

Kissel, of course, focuses on the continuance of the conspiracy itself and not just the continuance of an individual conspirator's membership in the conspiracy, the issue addressed in Hyde. But the life of conspiracy is also the issue in the present case. Moreover, the basic constitutional issues are the same in Kissel and Hyde. Finally, the lower courts have largely forgotten the language in Kissel and extended the language in Hyde to cover the duration of the entire conspiracy. This development in the law is all the more remarkable in that Hyde dealt with the general conspiracy statute in which an

overt act is required as an essential element, see Fiswick v. United States, 329 U.S. 211, 216 & n.4 (1946), whereas Kissel dealt with the Sherman Act in which no overt act must be pleaded or proved as an essential element of the crime.*

The reasoning in Hyde and its progeny appears at war with the statute of limitations as well. The applicable general statute of limitations commands that "no person shall be prosecuted . . . for any offense . . . unless the indictment is found . . . within five years next after such offense shall have been committed." 18 U.S.C. § 3282 (emphasis added.) The RICO offense in question requires an agreement by

*Even more remarkable is the citation of Kissel by the court below for the proposition that "[t]he conspiracy may be deemed to continue so long as its purposes have neither been abandoned nor accomplished." 719 F.2d at 1124.

persons employed by or associated with an enterprise to conduct or participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity. 18 U.S.C. § 1962(c) and (d). "Racketeering activity" is defined to mean "any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1954 (relating to unlawful welfare fund payments) . . . ." 18 U.S.C. § 1961(1)(B)(emphasis added.) "Pattern of racketeering activity" is defined to require "at least two acts of racketeering activity" which must have "occurred" in certain time frames. 18 U.S.C. § 1961(5) (emphasis added.) And, as the Magistrate pointed out below, the Congress deleted a subsection (e) from the proposed RICO legislation which would have provided as follows:

> A violation of this section shall be deemed to continue so long as the person who committed the violation continues to receive any benefits from the violation. S. Rep. 91-617 (1969)

(App. 40).

Thus, the statute of limitations would seem to require an act or some other conduct to have been committed or to have actually occurred within the time period set by the law in order to manifest that the agreement was still alive and, hence, that something blameworthy was still going on. The statute of limitations would seem to prohibit the doctrine of continuing offenses to be applied to RICO conspiracy in such a fashion as to allow the very existence of the conspiracy to be "deemed to continue," 719 F.2d at 1124, and "presumed to exist," 719 F.2d at 1125, unless the accused proves the contrary. See United States v.

Borelli, 336 F.2d 376 (2d Cir. 1964) (before the issue of withdrawal as an affirmative defense is even reached, "the Government must present evidence justifying the jury in finding beyond a reasonable doubt that the particular agreement into which a defendant entered continued into the period not barred by limitation."); Toussie v. United States, 397 U.S. 112, 114-15 (1970).

In sum, the decision below is in conflict with basic principles and important language in decisions of this Court. Moreover, there is a conflict among the circuits, most courts having been seduced by the presumption attributed to Hyde. Only the Seventh Circuit has read that case so as to impose the burden of proof upon the prosecution. United States v. Read,

658 F.2d 1225 (7th Cir. 1981).* Finally, the significance of the statute of limitations, the nearly universal inclusion of conspiracy charges by federal prosecutors and the recent proliferation of RICO charges all make the problems we have identified important, recurring questions of federal law. Certiorari should be granted.

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*No other Circuit has yet followed Read's analysis, and most of the Circuits prior to Read are contra. See, e.g., United States v. Stromberg, 268 F.2d 256 (2d Cir. 1959); United States v. Chester, 467 F.2d 53 (3d Cir.), cert. denied, 394 U.S. 1020 (1969); United States v. Blackshire, 538 F.2d 569 (4th Cir. 1976), cert. denied 429 U.S. 840 (1977); United States v. Pearson, 508 F.2d 595 (5th Cir.), cert. denied, 419 U.S. 1013 (1975) (binding on 11th Circuit); United States v. Mayes, 512 F.2d 637 (6th Cir. 1975); United States v. Boyd, 610 F.2d 521 (8th Cir. 1979), cert. denied, 444 U.S. 1089 (1980); United States v. Basey, 613 F.2d 198 (9th Cir. 1979), cert. denied, 446 U.S. 919 (1980); United States v. Parnell, 581 F.2d 1374 (10th Cir. 1978), cert. denied, 439 U.S. 1076 (1979).

III.

THIS COURT SHOULD ADOPT FOR THE FEDERAL COURTS THE MAJORITY RULE WHICH REQUIRES THAT AN INDICTMENT BE DISMISSED WHEN IT DOES NOT ALLEGE FACTS SHOWING THAT THE ALLEGED CRIMINAL ACT IS NOT BARRED BY THE STATUTE OF LIMITATIONS

The court of appeals held that "the indictment on its face satisfied the statute of limitations." 719 F.2d at 1125 (emphasis added). Since that court did not challenge the district court's ruling that overt act 28 was not in furtherance of the conspiracy, 719 F.2d at 1123, it must have relied upon the conclusory language commencing paragraph 3 of the indictment: "From in or about 1973, and continuously, thereafter at least until in or about December 1977 . . . " (App. A-1). Such language does not satisfy modern standards of criminal pleading. Rather, reliance on it represents adherence to the minority

rule by many federal courts even after the passage of the Federal Rules of Criminal Procedure. This Court should grant certiorari and bring the federal courts into the 20th century by adopting the majority rule.

A. The Majority Rule.

The majority rule at common law and in modern pleading practice is that an indictment must allege facts that show it is not barred by the statute of limitations. E.g., People v. Zamora, 18 Cal. 3d 538, 134 Cal. Rptr. 784, 557 P.2d 75, 92-93 n.26 (1976); Bustamante v. District Court, 138 Col. 97, 329 P.2d 1013, 1016 (1958); 4 Wharton, Criminal Law and Procedure § 1776 at 584 (R. A. Anderson 12th ed. 1957); Joyce, Indictments § 387 at 432 (2d. ed. 1924); Bishop, New Criminal Procedure § 405 at 334-35 (2d. ed.

1913); see United States v. Laut, 17 F.R.D. 31 (S.D.N.Y. 1955); United States v. Gammill, 421 F.2d 185 (10th Cir. 1970); United States v. Benten and Co., Inc., 345 F. Supp. 1101 (M.D. Fla. 1972). Petitioners urged this rule to the court of appeals.

Some of the federal cases cited in the government's brief below either adopted or reflected the thinking of the minority view. They either stated or suggested that a federal indictment is not required to plead facts which show the crime occurred within the statute of limitations. E.g., United States v. Cook, 84 U.S. (17 Wall.) 168 (1872); United States v. Kissell, 218 U.S. 601 (1910).

These cases predate the Federal Rules of Criminal Procedure. Often their holdings were framed by the technical regime of common-law pleading.

See Cook, 84 U.S. (17 Wall.) at 173-182 (limitations of demurrer construed to preclude the pre-trial adjudication of a statute of limitations defense). Still other cases relied upon by the government set forth conclusory statements and offer no analysis. These cases should not be relied upon because the minority view simply is inconsistent with the purposes and goals of the Federal Rules of Criminal Procedure, the limited resources of the federal courts, fairness to the defendants, a simple cost-benefit analysis, and therefore, is unacceptable.

B. The Majority Rule is Sound.

The Federal Rules of Criminal Procedure "shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Fed. R. Crim. P. 2. They permit the accused

to move to dismiss a time-barred indictment, Fed. R. Crim. P. 12(a), and permit the pre-trial adjudication of the statute of limitations defense. Fed. R. Crim. P. 12(b). As many courts have noted, it simply makes sense to learn that an indictment is time-barred before a lengthy trial. (R.8:1332, n. 1; 11:5, 5-6); United States v. Haramic, 125 F. Supp. 128 (W.D. Pa. 1964).

A statute of limitations is a complete bar to the indictment. In general, it favors "repose", and, in particular, 18 U.S.C. § 3282 bars untimely "prosecutions," and extinguishes the power of the court to entertain time-barred prosecutions. These policies demand the earliest resolution of the statute of limitations defense. Accordingly, the limited resources of the courts and fairness to the Defendants demand the earliest

resolution of the statute of limitations defense. The majority rule evokes the adage "an ounce of prevention is worth a pound of cure."

The indictment must plead the occurrence of an overt act in furtherance of the conspiracy, or similar facts manifesting that the conspiracy is alive, committed within five years of the return of the indictment. If the conspiracy is to be deemed living -- despite the absence of any signs of life -- by the employment of some presumption, then the presumption should at least be pleaded.

When the indictment issues, the government is the accuser. It has the burden of proof and it has superior knowledge. If the government can allege the occurrence of an act in furtherance of the conspiracy within the statute of limitations period, justice,

fairness and efficiency require it to do so. The costs of such a pleading requirement are virtually zero. The potential savings to the parties, to the courts and to the public could be enormous. If the government cannot adequately make such an allegation, then there should be no indictment.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ARTHUR A. COIA
ARTHUR E. COIA
ALBERT J. LEPORE and
JOSEPH J. VACCARO, JR.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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[INDICTMENT OF THE UNITED STATES DISTRICT COURT]

Filed on September 23, 1981 in

Case No.: 81-417-Cr-ALH

INDICTMENT

THE GRAND JURY CHARGES:

1. At all times material to this Indictment:

a. The Laborers International Union of North America ("Laborers Union") was an employee organization representing workers engaged in interstate commerce and engaged in an industry and activity affecting interstate commerce, that is, the building and construction trades.

b. The Laborers Union and its subordinate bodies and affiliated employee benefits plans constituted an enterprise as defined by Title 18, United States Code, Section 1961(4),

which enterprise was engaged in and the activities of which affected interstate commerce.

c. Up to and including December 31, 1974, the following employee welfare benefit plans were plans subject to the provisions of the Welfare and Pension Plans Disclosure Act (29 U.S.C. 301-309):

(1) Massachusetts Laborers Health and Welfare Fund ("Massachusetts Laborers Fund");

(2) Rhode Island Laborers Health and Welfare Heavy Construction Trust Fund ("Rhode Island Laborers Construction Fund");

(3) Rhode Island Laborers Health and Welfare Fund ("Rhode Island Laborers Fund");

(4) Broward County Carpenters Health and Welfare Fund ("Carpenters Union Fund");

(5) Southeast Florida Laborers District Council Dental, Vision and Preventative Care Trust Fund ("Florida Dental Plan");

(6) Laborers Health and Welfare Fund of Dade County ("Dade County Fund");

(7) Laborers Local 938 Health and Welfare Fund of Broward County, Florida ("938 Fund");

(8) Laborers Local 666 Health and Welfare Trust Fund of Dade County ("666 Welfare Fund"); and

(9) Laborers Local 767 Health and Welfare Trust Fund of Palm Beach County ("767 Welfare Fund").

d. From January 1, 1975, through December 31, 1977, the employee welfare benefit plans listed in paragraph 1c above were plans subject to the provisions of Title 1 of the Employee

Retirement Income Security Act of 1974 (29 U.S.C. 1001-1144).

e. The following were employee organizations which represented employees engaged in interstate commerce and in an industry and activity affecting interstate commerce, and the members of which were covered by one or more of the employee welfare benefit plans set forth in paragraph 1c:

(1) Laborers International Union of North America ("Laborers Union");

(2) Massachusetts Laborers District Council;

(3) Maine Laborers District Council;

(4) New Hampshire Laborers District Council;

(5) Vermont Laborers District Council;

(6) Rhode Island Laborers General Council;

(7) Broward County (Florida) Carpenters District Council;

(8) Southeast Florida Laborers District Council;

(9) Laborers International Union of North America, Local Union 478 ("Local 478");

(10) Laborers International Union of North America Local Union 666 ("Local 666");

(11) Laborers International Union of North America Local Union 767 ("Local 767");

(12) Laborers International Union of North America Local Union 938 ("Local 938");

f. Northeast Insurance Agency, Inc. ("Northeast") was a Rhode Island corporation purportedly engaged in the sale of life insurance but which

in fact served as a conduit for kickback.

g. Norcorp Equity, Inc. ("Norcorp") was a Rhode Island corporation which was established as the holding company for Northeast.

h. National Group Insurance Agency, Inc. ("National Group") was a Massachusetts corporation purportedly engaged in the sale of life insurance but which in fact served as a conduit for kickbacks.

i. Old Security Life Insurance Company ("Old Security") was located in Kansas City, Missouri.

j. Farmers National Life Insurance Company ("Farmers National") was a Florida corporation which, through a reinsurance agreement with Old Security, provided benefit plan services in the form of life, accident, and health insurance coverage to members of the Massachusetts Laborers Fund, the

Rhode Island Laborers Construction Fund, and the Rhode Island Laborers Fund. Farmers National also provided such insurance directly to the Carpenters Union Fund.

k. Farmers Financial Corporation was the holding company of Farmers National.

l. Great American Life Insurance Company ("GALICO") was a New Jersey corporation which Joseph Hauser attempted to purchase.

m. Great Pacific Corporation ("Great Pacific") was a holding company controlled by Joseph Hauser through which he attempted to purchase GALICO.

n. National American Life Insurance Company ("NALICO") was a Louisiana corporation purchased by Joseph Hauser.

o. National Pacific Corporation ("National Pacific") was the holding company for NALICO.

p. Dental and Vision Care Centers, Inc. of Miami, Florida ("DVCC") provided benefit plan services such as dental, vision, and related medical services to members of the Laborers Union through the Florida Dental Plan.

2. At various times material to this Indictment:

a. Defendant ARTHUR A. COIA was a member of the law firm of Coia and LePore, Ltd., Providence, Rhode Island, the Business Manager of the Rhode Island General Council of the Laborers Union, International Representative of the Laborers Union, and the son of defendant ARTHUR E. COIA.

b. Defendant ARTHUR E. COIA was an International Vice-President

of the Laborers Union, Chairman and Trustee of the New England Training Trust Fund, President of Local 271 of the Laborers Union, Providence, Rhode Island, and Chairman and Trustee of the Rhode Island Laborers Legal Services Fund.

c. Defendant ALBERT J. LE PORE was a member of the law firm of Coia and LePore, Ltd., Providence, Rhode Island, counsel to the Rhode Island Laborers Health and Welfare Trust Fund, President of the Northeast Insurance Agency in Providence, Rhode Island, and a Rhode Island State Representative.

d. Defendant RAYMOND L. S. PATRIARCA was a resident of Providence and Narragansett, Rhode Island.

e. Defendant JOSEPH J. VACCARO, JR., was a trustee of the New England Laborers Training Trust Fund

and President of National Group Insurance Agency in Boston, Massachusetts.

f. Joseph Hauser controlled Farmers National in Miami, Florida, and other companies.

g. Michele Gergora was President of Broward County (Florida) Carpenters District Council in the Southern District of Florida.

3. From in or about 1973, and continuously thereafter at least until in or about December 1977, in the Southern District of Florida and elsewhere, the defendants ARTHUR A. COIA, ARTHUR E. COIA, ALBERT J. LE PORE, RAYMOND L. S. PATRIARCA, and JOSEPH J. VACCARO, JR., did knowingly, willfully, and unlawfully, conspire combine, confederate, and agree together, with each other, and with other persons known and unknown to the Grand Jury, to conduct and participate, directly and

indirectly, in the conduct of the affairs of the Laborers Union through a pattern of racketeering activity in violation of Title 18, United States Code, Section 1962(c).

4. The purpose of the conspiracy was to obtain money for the defendants and co-conspirators by setting up or purchasing insurance and service companies, exercising influence over unions and union trust funds to funnel insurance and service business from those funds into the insurance and service companies, charging union members for the most expensive form of insurance, and looting the insurance premiums paid by using them for kickbacks, payoffs, unearned salaries and fees, and improper personal expenses.

5. It was part of the conspiracy that the defendants and co-conspirators would be employed by or associated with

an enterprise which was engaged in, and the activities of which affected interstate commerce, to-wit: the Laborers Union, including its subordinate bodies and affiliated benefit plans.

6. It was further part of the conspiracy that the defendants and co-conspirators would commit and cause to be committed multiple acts of racketeering activity, to-wit: the unlawful payment and receipt of things of value relating to questions and matters concerning employee welfare benefit plans, in violation of Title 18, United States Code, Section 1954.

7. It was further part of the conspiracy that some of the defendants and the co-conspirators would, directly or indirectly, give, offer, and promise to give and offer, fees, kickbacks, commissions, gifts, loans, money, and other things of value to other

defendants and co-conspirators who were administrators, officers, trustees, custodians, counsel, agents, and employees of employee welfare benefit plans, with other defendants and co-conspirators aiding, abetting, and counseling both of the previous groups, because of, and with intent to influence, the actions, decisions, and other duties of such defendants and co-conspirators as administrators, officers, trustees, custodians, counsel, agents and employees relating to questions and matters concerning such plan, that is, granting of insurance business, in violation of Title 18, United States Code, Sections 1954 and 2.

8. It was further part of the conspiracy that defendants ARTHUR A. COIA, ARTHUR E. COIA, ALBERT J. LE PORE, RAYMOND L. S. PATRIARCA and JOSEPH J. VACCARO, JR., and others, known and

unknown to the Grand Jury, would receive and agree to receive and solicit fees, kickbacks, commissions, gifts, loans, monies, and other things of value because of, and with intent to be influenced with respect to their actions, decisions, and duties relating to questions and matters concerning employee benefit plans.

9. It was further part of the conspiracy that Joseph Hauser would purchase and operate Farmers National as an insurer of union members and would pay kickbacks to defendants ARTHUR A. COIA, ARTHUR E. COIA, ALBERT J. LE PORE, RAYMOND L. S. PATRIARCA and JOSEPH J. VACCARO, JR., and others, known and unknown to the Grand Jury, from proceeds received from Laborers Union and other union trust funds for insurance provided by Farmers National, and would provide other things of value.

10. It was further part of the conspiracy that defendant JOSEPH J. VACCARO, JR., would set up National Group for the purpose of being a conduit to disguise kickback money paid by Joseph Hauser and Farmers National, which kickbacks were intended for defendants RAYMOND L. S. PATRIARCA and JOSEPH J. VACCARO, JR., and other persons known and unknown to the Grand Jury.

11. It was further part of the conspiracy that defendants ARTHUR A. COIA and ALBERT J. LE PORE would set up Northeast for the purpose of being a conduit to disguise kickback money paid by Joseph Hauser and Farmers National, which kickbacks were intended for defendants ARTHUR A. COIA, ARTHUR E. COIA, ALBERT J. LE PORE, and others known and unkown to the Grand Jury.

12. It was further part of the conspiracy that defendant ARTHUR E. COIA would provide Joseph Hauser with inside information regarding the awarding of insurance contracts by certain employee welfare benefit plans listed in paragraph 1c above and would use his influence, directly or indirectly, to insure the award of the insurance contracts to Old Security.

13. It was further part of the conspiracy that Joseph Hauser, with the assistance of the defendants and other persons known and unknown to the Grand Jury would seek to acquire an insurance company authorized to write insurance business in a large number of states.

14. It was further part of the conspiracy that the defendant ARTHUR A. COIA, ARTHUR E. COIA, ALBERT J. LEPORE, RAYMOND L. S. PATRIARCA and JOSEPH

J. VACCARO, JR., and other persons, known and unknown to the Grand Jury would agree to and support the operation of a kickback scheme involving services rendered to the Laborers Union initially in Florida and eventually nationwide in return for payments of money.

15. It was further part of the conspiracy that the defendants and persons known and unknown to the Grand Jury would perform other acts during the course of the conspiracy to hide and conceal, and cause to be hidden and concealed, the purpose of the conspiracy and the acts committed in furtherance of the conspiracy.

OVERT ACTS

In furtherance of the described conspiracy and to effect the objects therof, the following overt acts, among others, were committed in the Southern District of Florida, and elsewhere:

1. In or about 1973, in the District of Rhode Island, defendant ARTHUR E. COIA and other persons known and unknown to the Grand Jury met with Joseph Hauser concerning the purchase of Farmers National.

2. In or about October 1973, Joseph Hauser acquired Farmers National.

3. In or about February 1974, in the Southern District of Florida, defendant ARTHUR E. COIA met with Joseph Hauser.

4. Between in or about March 1974, and in or about June 1976, in the Southern District of Florida and elsewhere, defendant ARTHUR E. COIA received periodic payments of approximately $5,000 each from Joseph Hauser.

5. In or about 1974, in the District of Rhode Island, defendants ARTHUR E. COIA, RAYMOND L. S. PATRIARCA, and JOSEPH J. VACCARO, JR., met with

Joseph Hauser for the purpose of discussing future insurance business and kickbacks to defendant RAYMOND L. S. PATRIARCA.

6. On or about April 1, 1974, Joseph Hauser formed Farmers Financial Corporation.

7. In or about February 1975, in the Southern District of Florida, defendant JOSEPH J. VACCARO, JR., met with Joseph Hauser.

8. On or about March 24, 1975, in the District of Massachusetts, defendant JOSEPH J. VACCARO, JR., and persons known and unknown to the Grand Jury formed National Group.

9. On or about June 29, 1975, in the District of Massachusetts, defendants ARTHUR E. COIA and JOSEPH J. VACCARO, JR., met with Joseph Hauser to discuss the insurance contract award of the Massachusetts Laborer's Fund.

10. In or about 1975, defendants ARTHUR E. COIA and JOSEPH J. VACCARO, JR., contacted Trustees of the Massachusetts Laborers Fund to influence their votes regarding union insurance.

11. Between in or about July 1975, and in or about July 1976, in the Southern District of Florida and elsewhere, defendant ARTHUR E. COIA and Joseph Hauser gave Nathan Gergora and Michele Gergora periodic payments of $5,000 cash as a kickback for the Carpenters Union Fund insurance business.

12. On or about December 19, 1975, Joseph Hauser sent $7,500 by wire transfer to Grace LeConche, as a form of kickback to defendant ARTHUR E. COIA and others known and unknown to the Grand Jury.

13. In or about January 1976, in the Southern District of Florida,

defendant ALBERT J. LE PORE met with Joseph Hauser.

14. In or about February 1976, in the Southern District of Florida, defendants ARTHUR A. COIA and ALBERT J. LE PORE received two checks totalling $50,000 from Joseph Hauser.

15. During 1976 defendant RAYMOND L. S. PATRIARCA advised Joseph Hauser that the insurance business of the Laborers Union would be controlled by "the family" with defendant RAYMOND L. S. PATRIARCA controlling the northeast United States, Santo Trafficante controlling the southern United States, and Anthony Accardo controlling the midwestern United States.

16. On or about February 6, 1976, in the District of Rhode Island, defendants ARTHUR A. COIA and ALBERT J. LE PORE formed Northeast and Norcorp.

17. In or about March 1976, defendant ARTHUR E. COIA met with Gilbert H. Hawkins of Citizens Bank (Providence, Rhode Island) and offered to use his influence to divert union funds to Citizens Bank if the bank would loan money for the purchase of GALICO.

18. On or about April 21, 1976, defendant ARTHUR E. COIA and Joseph Hauser caused $1,000,000 to be transferred out of the bank account which held insurance premiums from the Massachusetts Laborers Fund.

19. In or about February and March 1976, defendants ARTHUR A. COIA and ALBERT J. LE PORE travelled to New Jersey to meet with the Deputy Insurance Commissioner of the New Jersey Department of Insurance in an attempt to obtain approval for Great Pacific to acquire GALICO.

20. In or about May 1976, Joseph

Hauser and Great Pacific were refused permission by the New Jersey Department of Insurance to purchase GALICO.

21. On or about June 14, 1976, National Pacific was organized by Joseph Hauser and others known and unknown to the Grand Jury, with 2,500,000 shares of its stock going to Ceteka Trust and 200,000 shares to Northeast. On or about the same date, said National Pacific Corporation aquired NALICO.

22. On or about June 22, 1976, defendant ARTHUR E. COIA attended a meeting of the Trustees of the Rhode Island Laborers Fund and attempted to influence their votes regarding union insurance.

23. On or about July 16, 1976, Joseph Hauser sent a letter to defendant ARTHUR A. COIA, enclosing a check for $50,000.

24. On or about July 26, 1976,

defendant JOSEPH J. VACCARO, JR., received a $20,000 check from defendant ALBERT J. LE PORE.

25. On or about July 28, 1976, in the District of Rhode Island, defendant JOSEPH J. VACARRO, JR., received $30,000 by means of a check to National Group.

26. On or about September 16, 1976, defendants ARTHUR A COIA and ALBERT J. LE PORE appeared before the Securities and Exchange Commission in Washington, D.C., and testified falsely in an attempt to thwart that Commission's investigations and continued their insurance activities.

27. In or about September 1976, defendant ARTHUR E. COIA spoke by telephone with Joseph Hauser regarding the Securities and Exchange Commission's investigation and plans for future insurance activity.

28. On or about October 19, 1976, defendant ALBERT J. LE PORE wrote a check for $2,000 to himself out of funds provided in part by Joseph Hauser.

All in violation of Title 18, United States Code, Section 1962(d).

THE GRAND JURY FURTHER CHARGES:

The Defendants ARTHUR A. COIA, ARTHUR E. COIA, ALBERT J. LE PORE and JOSEPH J. VACCARO, JR., have interests in, and property and contractual rights, as described in paragraph 2a, 2b, 2c, and 2d, page 4 above, affording them a source of influence over the Laborers Union and its subordinate bodies and affiliated employee benefit plans. Said Laborers Union and its subordinate bodies and affiliated employee benefit plans constituted an enterprise, as set forth in paragraph 1b herein, which the defendants controlled, conducted, and

participated in the conduct of, in violation of Title 18, United States Code, Section 1962, as set forth herein, thereby making all such property and contractual rights and interests subject to forfeiture to the United States of America pursuant to Title 18 United States Code, Section 1963(a)(2).

[REPORT OF UNITED STATES MAGISTRATE
OF THE UNITED STATES
DISTRICT COURT]
Entered on March 3, 1982 in
Case No. 81-417-Cr-JLK

The defendant Arthur E. Coia has filed a Motion to Bar Prosecution. This motion has been referred to the undersigned for preliminary consideration and report, pursuant to 28 U.S.C. §636(b)(1)(B).

The defendant contends that this prosecution is prohibited by the applicable statute of limitations, 18 U.S.C. §3282, which provides a period of five years. The indictment was returned on September 23, 1981. It alleges that the conspiracy lasted from 1973 "at least until in or about December 1977." This statute, unless suspended, runs from the last overt act

committed during the existence of a conspiracy. Fiswick v. United States, 329 U.S. 211 (1946). Of the 28 overt acts alleged in this indictment, only the last, overt act 28, is asserted to have occurred within the five year period prior to September 23, 1981.

Overt Act 28, in its entirety, is as follows:

> On or about October 19, 1976, defendant ALBERT J. LEPORE wrote a check for $2,000 to himself out of funds provided in part by Joseph Hauser.

The defendant Arthur E. Coia argues that this act, if it occurred, was not in furtherance of the alleged conspiracy but was, instead, merely the use by one of the co-conspirators of a portion of his share of the proceeds. He argues that if such a use of proceeds is an overt act the statute of limitations would be meaningless since any

time a coconspirator used any of his ill gotten gains, for al long as he lived, the statute of limitations would commence running anew.

In its response, the government argues, in part, that the RICO conspiracy statute, 18 U.S.C. §1962(d), does not require allegation and proof of an overt act in furtherance of the conspiracy. As recently as December 28, 1981, however, the Former Fifth Circuit stated quite clearly:

> ...[N]o actual acts of racketeering need occur; there need only exist a conspiracy to perform the necessary acts plus some overt action by one of the conspirators in furtherance of the conspiracy. United States v. Phillips, ___ F.2d _____, _____ (Former 5 Cir. Nos. 79-3189, 80-5320, Dec. 28, 1981), slip. op. pg. 13942 (Emphasis added).

The Phillips court quoted the earlier Fifth Circuit decision, United States v.

Sutherland, 656 F.2d 1181, 1187, n.4 (5 Cir. 1981), in which the Court clearly indicated the need for proof of an overt act in furtherance of a RICO conspiracy.

Although the RICO net is very broad, it appears that under the present law of this Circuit it is at least woven tightly enough to require some overt act by a conspirator in furtherance of the conspiracy.

The government argues, however, that even if a timely overt act is required, overt act 28 will suffice. It argues that whether the act of writing the check was in furtherance of the conspiracy is a matter for proof at trial. In response to the defense argument that overt act 28 only alleges the use by a coconspirator of proceeds of the conspiracy, the government states that at trial:

> ...[P]roof will show an ongoing conspiracy and a pattern of using checks to cash and to the defendants through "conduits" (Indictment paras. 10,11) as one means of illegally converting union funds. Govt. memo pg. 3.

Of course, the validity of the indictment must be determined on its face. If no timely overt act in furtherance of the conspiracy is alleged in the indictment, it is no answer to assert that one or more will be established at trial.

The indictment clearly states the purpose of the alleged conspiracy as follows:

> The purpose of the conspiracy was to obtain money for the defendants and co-conspirators by setting up or purchasing insurance and service companies exercising influence over unions and union trust funds to funnel insurance and service business from those funds into the insurance and service com-

> panies, charging union members for the most expensive form of insurance, and looting the insurance premiums paid by using them for kickbacks, payoffs, unearned salaries and fees, and improper personal expenses.

Overt act 28 simply says that the defendant Albert LePore wrote a check to himself out of funds provided in part by Joseph Hauser. The indictment alleges that LePore is an attorney who was the President of Northeast Insurance Agency in Providence, Rhode Island, and counsel to the Rhode Island Laborers Fund (¶2.c). It further alleges that Northeast Insurance Agency was purportedly engaged in the sale of life insurance but in fact served as a conduit for kickbacks. (¶1.f). Joseph Hauser allegedly controlled Farmers National in Miami, Florida, and other companies. (¶2.f). Farmers National, in turn, allegedly provided benefit plan

services in the form of life, accident, and health insurance coverage, either directly or indirectly, to members of the Massachusetts Laborers Fund, the Rhode Island Laborers Construction Fund, the Rhode Island Laborers Fund, and the Carpenters Union Fund. (¶1.j).

Thus, in essence, Overt Act 28 alleges that Hauser, who controlled a company which provided benefit plan insurance services to members of certain labor organization funds, had "provided" some money at some unknown time to Albert J. LePore, a defendant, who was legal counsel for one of the Funds for which such insurance services were provided. Thereafter, on October 19, 1976, LePore wrote a check to himself drawn in part from the funds provided by Hauser.

It appears that the position of the defendant Coia is well taken. If, as

the indictment alleges, the purpose of the conspiracy was to obtain money for the defendants by means of kickbacks, and if, as the indictment further indicates, Joseph Hauser was a payor of kickbacks and the defendant LePore a payee, it would seem that the purpose of the conspiracy was complete upon delivery by Hauser of money to the possession or control of LePore. What LePore thereafter did with the funds would not be in furtherance of the goals of the conspiracy but rather a use of the fruits of the conspiracy.

It is well established law that a grand jury indictment must set forth each essential element of the offense alleged. United States v. Outler, 659 F.2d 1306, 1310 (5th Cir. 1981), and cases cited therein. As previously discussed, a RICO conspiracy has been held in this Circuit to require an overt

act as an essential element. If, therefore, Overt Act 28, on its face, does not appear to have been in furtherance of the alleged conspiracy, this indictment is insufficient. All of the remaining alleged overt acts are time barred. Although Overt Act 15 is alleged to have occurred "during 1976" and Overt 27 is alleged to have occurred "in or about September 1976" such allegations cannot supply the necessary element of an overt act committed prior to September 23, 1976.

The government also argues in part that a RICO conspiracy is a "continuing offense" and should be presumed to continue unless a conspirator can establish that he affirmatively withdrew from the conspiracy. The doctrine of continuing offenses, however, is very narrow, and requires a clear intent by Congress to establish such an offense.

The Supreme Court in Toussie v. United States, 397 U.S. 112, 114-115, (1970), explained the doctrine as follows:

> In deciding when the statute of limitations begins to run in a given case several considerations guide our decision. The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. For these reasons and others, we have stated before "the principle that criminal limitations statutes are 'to be liberally interpreted in favor of repose'. United States v. Scharton, 285 U.S. 518, 522 (1932)." United

States v. Habig, 390 U.S. 222, 227 (1968). We have also said that "[s]tatutes of limitations normally begin to run when the crime is complete." Pendergast v. United States, 317 U.S. 412, 418 (1943); see United States v. Irvine, 98 U.S. 450, 452 (1879). And Congress has declared a policy that the statute of limitations should not be extended "[e]xcept as otherwise expressly provided by law." 18 U.S.C. §3282. These principles indicate that the doctrine of continuing offenses should be applied in only limited circumstances since, as the Court of Appeals correctly observed in this case, "[t]he tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent; the latter, for all practical purposes, extends the statute beyond its stated term." 410 F.2d, at 1158. These considerations do not mean that a particular offense should never be construed as a continuing one. They do, however, require that such a result should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.

A perfect illustration of a continuing offense is 18 U.S.C. §3284, which provides that:

> The concealment of assets of a debtor in a case under Title 11 shall be deemed to be a continuing offense until the debtor shall have been finally discharged or a discharge denied, and the period of limitations shall not begin to run until such final discharge or denial of discharge.

The RICO conspiracy statute, 18 U.S.C. §1962(d) has been described as a continuing offense, to the extent that it makes it unlawful to conspire in specified ways with regard to a "pattern of racketeering activity," which, as defined in 18 U.S.C. §1961(5) can include acts of racketeering activity as long as 10 years apart. Thus, although a given act of racketeering activity might be barred by the general five year statute of limitations, 18 U.S.C. §1382, it will not be barred if timely

pursuant to 18 U.S.C. §1961(5). United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), aff'd. 578 F.2d 1371 (2 Cir. 1978), cert. dismissed, 439 U.S. 801 (1978). In relying upon Field, however, the government has overlooked its holding that the five year limitation period for violations of the RICO Act "runs from the date of the last alleged act of racketeering activity." Id. at 59. Thus, there must still be an overt act within the five year period, and, if a substantive RICO offense were charged, as in Field, it would have to be not merely any overt act, but an act of racketeering activity, as defined in 18 U.S.C. §1961(1).

It is particularly interesting to note the legislative history of 18 U.S.C. §1962. The original proposed legislation included a subsection (e) which was not enacted:

> A violation of this section shall be deemed to continue so long as the person who committed the violation continues to receive benefits from the violation. S. Rep. 91-617 (1969).

The failure of Congress to enact this proposed subsection indicates its intention to rely upon the five year general statute. United States v. Forsythe, 560 F.2d 1127, 1134 (3d Cir. 1977).

This indictment does not appear to allege an offense occurring within the five years immediately prior to its return. It is therefore the recommendation of the Magistrate that it be dismissed pursuant to Fed. R. Crim. P. 12(e).

Dated:

/s/ Charlene H. Sorrentino
UNITED STATES MAGISTRATE

cc: All Counsel of Record

[HEARING ON DISMISSAL OF INDICTMENTS]

(Transcript of March 10, 1982)

Case No. 81-417-CR-JLK

Before: Honorable James L. King, United States District Judge

Appearances:

DANIEL I. SMALL, ESQ., and WILLIAM HYATT, ESQ., Assistant United State Attorneys, on behalf of the government.

ANTHONY TRAINI, ESQ., on behalf of Defendant Arthur A. Coia.

JAMES JAY HOGAN, ESQ., and JOSEPH BEELER, ESQ., of counsel, on behalf of Defendant Arthur E. Coia.

MARTIN LEPPO, ESQ., on behalf of Defendant Albert J. Le Pore.

JOSEPH T. TRAVALINE, ESQ., on behalf of Defendant Joseph J. Vacarro, Jr.

THE COURT: All right, gentlemen. Let's see. We have a Mr. Small with us

this morning?

MR. SMALL: Yes, Your Honor.

THE COURT: And we have Mr. Hyatt?

MR. HYATT: Bill Hyatt too, Your Honor.

THE COURT: Yes. And Mr. Hogan.

MR. HOGAN: Morning, Your Honor. Here for Arthur E. Coia.

YOUR HONOR, this is Mr. Anthony Traini. He represents Arthur A. Coia. He is a member of the Massachusetts Bar. He has not been formally admitted for the purpose of this case. I would move his admittance.

THE COURT: Granted.

MR. TRAINI: Thank you, Your Honor.

THE COURT: And then we have Mr. Leppo and Mr. Travaline.

MR. TRAVALINE: Morning, Your Honor.

THE COURT: Mr. Travaline, how is your cold? Any better than it was last time?

MR. TRAVALINE: Much better.

THE COURT: Fully recovered. All right.

Mr. Hyatt, are you going to argue the matter or is Mr. Small going to argue it?

MR. HYATT: Mr. Small is, Your Honor.

THE COURT: Now, I presume that all of you have received the report of United States Magistrate Sorrentino that was filed March 3, 1982; and I have scheduled this hearing for the purpose of determining, first, the government's position, and then any response the defendants would care to make.

I am particularly interested in the government's position with respect to the magistrate's recommendation on the question of whether an overt act must be alleged within the five-year period of the statute of limitations.

MR. SMALL: Your Honor, there are essentially three separate issues here. The first is whether this is a pretrial matter at all. The second is the overt act issue, and the third is the in furtherance question.

Let me go first to the question the Court addressed. That is the overt act issue.

THE COURT: Wait a minute. You suggest that there are three issues. One is whether or not this is properly a pretrial matter?

MR. SMALL: Yes, Your Honor.

THE COURT: Okay. And would you tell me the other two again?

MR. SMALL: The second is whether an overt act is required at all in this indictment or under the RICO statute.

The third is whether, if there is such a requirement, the overt act that is alleged in this indictment, overt act

28, is an overt act in furtherance of the conspiracy, and therefore qualifies under 3282.

THE COURT: And you are referring to overt act 28, I guess?

MR. SMALL: 28, Your Honor.

THE COURT: Well, are you suggesting under your first issue that it would be better to get into the middle of the trial and find out what the government is going to prove and spend some time doing this before we decided this issue?

If this is not the right time to consider and determine whether or not the government has an indictment that is sufficient on its face to withstand a motion for directed verdict at the conclusion of the government's case, then when would it be?

MR. SMALL: Your Honor, it is the proper time to determine whether the

indictment is sufficient on its face. What the government is saying is that this indictment alleges a conspiracy which continues into the period and it alleges that an overt act is in furtherance of this conspiracy.

THE COURT: I understand your points two and three very clearly. I was having a little trouble with your point one, because I thought I understood you to say that you felt it was premature to be getting into a question of whether or not the indictment was sufficient; and I didn't know whether you were suggesting we should go ahead and try the case and when the government rests its case decide the issue.

The course the government would be in a pretty bad position at that point if you got an adverse ruling.

MR. SMALL: Your Honor is familiar, I am sure, with any number of indict-

ments where the overt acts alleged are X met Y or on such-and-such a date X picked up a brown paper bag.

The reason that those overt acts are accepted as proper is that the law is that if the indictment alleges an overt act and alleges that that overt act is in furtherance of the conspiracy, that is the conclusion of the pretrial stage.

THE COURT: Over which there can be no issue because, of course, you know, the act of walking across a street to help the fellow rob the bank or making a phone call to help him rob a bank or picking up an envelope or something, those things are on their face obviously connected with the alleged offense.

The problem we have here is whether or not writing a check on funds, drawing a check on funds to spend alleged ill gotten gains, is in furtherance of the

conspiracy; but that I guess is getting into your point two.

Why don't you go ahead and present your argument the way you would like to.

MR. SMALL: Well, the first thing as far as whether or not this is a factual determination for trial, the problem is that time and again in the various motions we get into questions of intepretation, questions of trying to put this overt act in the context of the facts at trial.

In fact, this is not by any means the only act or overt act that the government will prove within the statute of limitations.

The law, as Your Honor is aware, does not require or even encourage the government to list ad infinitum every overt act that it will prove at trial. The law requires only one overt act, and

if the indictment alleges that that overt act is in furtherance of the conspiracy, that is the end of the pretrial discussion.

The most pointed statement of that is in our brief in Professor Wright's Federal Practice and Procedure where he says:

> "If factual matters are involved such as when a conspiracy ended or when an offense was consummated, the limitations question should be put off until trial."

We are telling the Court that our proof at trial will clearly show that this act was part of a pattern, it was part of the broader scheme, and it was one of several acts taken within the five-year statute of limitations.

Therefore, we are saying that now is not the time to dismiss an indictment which on its face alleges that an overt

act occurred and alleges that that overt act was in furtherance.

The law is that an indictment need not explain or defend how an overt act is in furtherance of the indictment, in furtherance of the conspiracy, and that is because if the indictment says it is in furtherance, that is enough.

As far as the overt act requirement itself, one of two things is going on here, Your Honor. Either there is a very strong disagreement among the circuits, with the cases that we have cited in our brief saying this is one of those types of conspiracies, and there are many of them, narcotics conspiracies and other conspiracies, which on their face do not require an overt act, and the Fifth Circuit saying that yes, it does require an overt act.

Either there is not disagreement or, and this this I think is what the

government alleges is happening, there are several cases within this circuit where, in the context of a general discussion of general conspiracy law, applying general conspiracy law to the RICO statute, the Court has in dictum said, by the way, there is this overt act requirement.

In none of those cases was overt acts in any way an issue, and in none of those cases did the Court discuss the other case law, the case law on overt acts.

The best example and the one that I am sure the court is most familiar with is the Phillips case, and that case is cited in the magistrate's opinion as one of the cases which requires an overt act.

Well, there is language in the Phillips case that talks about overt act, but it has absolutely nothing to do

with the issue in the Phillips case which was: Was there a pattern of racketeering activity. The Court is just saying this is the general law of conspiracy.

THE COURT: There were 129 issues in the Phillips case.

MR. SMALL: I know, but the issue that the magistrate and the defense have cited the language from is, if the Court will recall, where the court said as to one particular defendant there was not a pattern of racketeering because the two drug acts were the same; and because of that, there is no -- you can't conspire if there was no pattern.

The language that is quoted is just the Court's general language as an introductory part to that other language, and the language that the magistrate cites is from the slip opinion; but it can be found at 664 F.2d 1038,

and it refers to the Defendant Echezarreta, [illegible] that is the correct pronunciation.

THE COURT: Echezarreta is correct. We watched Mr. Echezarreta about every day for six months.

MR. SMALL: I am sure the Court is familiar with it.

THE COURT: I didn't peer at him every day, but he was sitting here by his very fine lawyer who is now a very fine judge.

MR. SMALL: But at any rate, the Phillips case is an example of why the government believes this is not an issue that has ever been decided by this Court, because it is not an issue that has ever been presented.

The only courts that have faced the issue have said the RICO statute does not include an overt act requirement. 371 does include an overt act require-

ment, and therefore -- and we have numerous cases cited in our brief involving other statutes, but two cases that have directly dealt with this issue.

The RICO statute does not require an overt act in the indictment. Therefore, the RICO statute does not require an overt act within the period of the statute of limitations.

It does require an allegation that the conspiracy continued into the period, and it does require the government at trial to provide proof that the conspiracy was in some fashion ongoing.

We have that proof, Your Honor. It will be submitted at trial.

THE COURT: Now, Judge Johnson refers in the Black Tuna opinion, which everybody is now calling U.S. versus Phillips, to the case of U.S. versus Sutherland, Fifth Circuit opinion at 656

F.2d 1181, decided in 1981, as being support for the proposition that there must be an overt act in the Fifth Circuit alleged; and I think both of you referred to that, or maybe the defense did in their briefs.

MR. SMALL: Your Honor, it is simply a case of dictum being adopted as dictum. The issue in Sutherland also had nothing to do with whether or not the RICO statute requires an overt act.

The Court simply as part of its explanation was talking about general conspiracy law and never confronted and never was confronted with -- because it didn't have to -- never was confronted with the issue.

As I say, there is this language in the Fifth Circuit and it is one of two things, either a strong disagreement between the circuits, which the Fifth

Circuit doesn't seem to recognize because it never refers to any of the other cases; or dictum in the Fifth Circuit and rulings in another circuit which did have to face the issue.

THE COURT: Which other circuit? The Seventh Circuit, is that?

MR. SMALL: Your Honor, it is cited in our brief at page 4. It is the case of U.S. v. Barton, 647 F.2d 224, Second Circuit, 1981, which was then followed in U. S. v. Loftin, 518 F.Supp. 839. That's the southern District of New York, 1981.

Those, as far as we have been able to find and apparently as far as the defense had been able to find, are the only cases in which this issue was addressed, and in Barton it was addressed and it was discussed and it was compared to other narcotics and other statutes that don't require an overt

act.

THE COURT: So you have the Second Circuit holding that there need not be an allegation of an overt act or proof of an overt act, and you have the Fifth Circuit by dictum, as you suggest, in two cases holding that there must be.

Are there any other circuits that have spoken to this?

MR. SMALL: Not that we have found, Your Honor.

The final issue is this in furtherance issue, and there two points need to be made. First of all, RICO conspiracy is a continuing offense; but second of all, in saying that, the government is not arguing that a continuing offense means that Section 3282 doesn't apply. Section 3282, the five-year general statute of limitations, governs the RICO conspiracy count. The question and

the issue is not whether it controls but how it controls and how it is used.

In this case we have an ongoing conspiracy, a continuing conspiracy presumed to be ongoing; and we have cited numerous cases in our brief at page 7 on the ongoing nature of the conspiracy.

In that case, in the case of an ongoing conspiracy, in furtherance does not mean advancement. It is not a literal phrase, and that's the Maguire case, Fifth Circuit. The only purpose in an ongoing conspiracy of an overt act is to show that there has not been abandonment of the conspiracy, to show that this continuing offense is continuing, and that's the Castro case, also a Fifth Circuit case, also cited in our brief.

In this case the objective of the conspiracy was to line the defendants'

pockets with money. It was done in various means, it was done through various conduit accounts. That is all alleged in the indictment. It was done through a pattern of checks.

This one payment comes off as an isolated payment in the indictment. That is because we have not alleged every single payment as an overt act. In fact, there is a pattern of checks, some of them before this check alleged, some of this after this check alleged, that were used as a pattern of using a conduit account, and the money was not in the possession of the defendants until they received the funds.

We are not talking about spending the proceeds of the conspiracy. We are talking about getting the proceeds. There are a couple of --

THE COURT: Well, if he had the money in his account, if Mr. Coia

had the money in his account as alleged and had it subject to his control, then he must have received it before the date that he withdrew it, logically.

MR. SMALL: This was a conduit, an interim account, and the very fact that he felt the need to write a check from this account to himself shows that it was a conduit account, and that's the same pattern that was with Northeastern Insurance Agency, and the other insurance. All the different agencies involved were used as conduits. Two examples come to mind. The first --

THE COURT: Suppose Mr. Coia had not written the check on his account until -- let's say he had waited 40 years.

MR HOGAN: I don't want the record to show Mr. Coia. Actually, it was Mr. Le Pore, a private account of Mr. Le

Pore.

THE COURT: Pardon me. Pardon me.

MR. SMALL: There are other checks alleged to Coia.

THE COURT: Let's say Defendant A in a hypothetical situation received monies from an alleged unlawful scheme to bilk pension funds and labor union funds of monies for the personal benefit of Defendant A, and Defendant A does that on January 1, 1982 and the money is unlawfully and improperly and illegally obtained from the union pension fund and diverted to an account controlled by the Defendant A.

Then let's say that Defendant A waits fifty years before he writes a check. At that point in time can the government then prosecute him fifty years from 1982, or 20, 30? Can they come into court and indict him? He has

written a check, now, on January 1, 2032.

MR. SMALL: Your Honor, I would say that it would depend not just on that check itself, but on the conspiracy, and if somehow this was a conspiracy.

I haven't been involved in any trials with conspiracies going on fifty years, but if there is evidence and the government alleges based on that evidence that the conspiracy somehow continued for fifty years, then we would have an ongoing conspiracy.

That's the problem of dealing with what is really a post trial issue in a pretrial context. This is an ongoing conspiracy. There was no withdrawal. There was no elapsing over a fifty-year period of the conspiracy.

In fact, the government's evidence will show before, during, and after this check, conversations between co-conspir-

ators; other checks to co-conspirators.

The government simply tried in its indictment not to allege every check, not to allege every conversation; but to allege sufficient evidence to support its indictment.

THE COURT: Then why were all the other overt acts that the government alleged, why did they all occur more than five years before this time? This is the only overt act that is alleged to have occurred within the five-year period, and this overt act is just short of five years before the indictment was filed.

In other words, most of the overt acts go back many years before that, and there is only one overt act that the government alleges in this indictment, and that overt act is alleged to be that Mr. Le Pore drew a check on an account that contained

ill-gotten gains that were unlawfully obtained in violation of federal law and placed in that account at some point in time earlier to the time he drew the check, and that he drew the check on that day, and that date is the only thing that is within the five-year period.

So, you see, we have a real problem here with --

MR. SMALL: Your Honor, there is no question that much of this activity went on before the five-year period. What the government has alleged in its indictment is that it went on before and after the five-year period.

THE COURT: Where do you allege after? Don't you allege -- the only factual allegation? You allege conclusions, but do you have a factual allegation?

MR. SMALL: No, Your Honor. We

have an allegation that the conspiracy was ongoing until December of 1977, and we have one overt act. That, in my reading of the law, before, during, and after we returned the indictment, is all that the law requires.

THE COURT: If the government had waited a few more weeks or days, you will agree this entire case would have been time barred?

MR. SMALL: We can argue over how long the period. There is no question there is a period of time after this indictment, I believe it is at least several months --

THE COURT: I think you say that the conspiracy allegedly ended December of 1977.

MR. SMALL: Yes, sir.

THE COURT: And you do suggest there was some activity on October 19, yes?

MR. SMALL: Yes, sir.

THE COURT: So this was this drawing of a check to himself on funds provided by Houser.

Now, so what we are talking about is that you came in under the statute of limitations by about two months. If it had been two months later, we all agree it would have been time barred, I guess.

MR. SMALL: We can debate over the exact time period, but there is a period of approximately that amount of time after it the action would have been time barred.

THE COURT: So in October of '76 Mr. Le Pore drew a check to himself for $2,000 on an account that had been previously established and funded, the government alleges, in part by Mr. Houser from ill-gotten gains in violation of Federal law.

Then the government waits approxi-

mately five years, a little less than five years to file suit, and that is what brings us up to this case; and you are saying that you had five years in which to bring suit and you brought it within the five year period; that is, you brought it within four years and ten months after the last alleged overt act, and you suggest that that alleged overt act of writing a check to himself from the ill-gotten gains is what saves you from not being time barred? Is that a reasonably fair statement?

MR. SMALL: That is basically it. I would assure Your Honor there is no one more than a prosecutor who dislikes a case where a lot of time has passed. It makes it harder on the witnesses, it makes it harder on the prosecution.

It is not a matter by any means where the government intentionally delayed the case until the last minute.

THE COURT: I didn't mean to suggest that. No, the record should be clear. I didn't mean to suggest there was any deliberate delay or anything. I am just trying to get the facts in perspective.

You have a case that is basically five years old at its most recent event, four years and ten months old at its most recent event. If it had been two months later that the indictment had been returned, it would have been clearly time barred.

The only question is whether or not this one overt act, one, should be taken up at this point in time without waiting for you to produce evidence; and two, whether or not it is an overt act within the framework of overt acts; and No. 3, whether it was in furtherance of the conspiracy.

Let me ask you this: You have

alluded to what you could produce at trial. What would you produce at trial that would show that there was an overt act alleged, an overt act committed in the period of this conspiracy?

MR. SMALL: Your Honor, there will be testimony as to repeated conversations taking the five-year period, starting from the five-year period and coming forward. There will be testimony as to repeated conversations between co-conspiractors as to further union insurance ventures among them, further, government alleges, further union insurance fraud. Among them there will be --

THE COURT: Will that be part of this case?

MR. SMALL: Absolutely.

THE COURT: Why would that be part of this case? If two people who have -- hypothetically again, I don't want to

offend Mr. Hogan or these other gentlemen's very -- what is the word? Tender sensibilities. I don't want to offend anybody, I'm sure.

Let's take it hypothetically. Let's say two defendants, A and B, two individuals, A and B, had successfully concocted a scheme to line their own pockets, using your language, with union funds, improperly and unlawfully; and they got away with it.

Time passed and five years passed by and they said, "That was pretty good. We did that back in 1975 and '74 and got away with it," and they get together and they plot and plan and talk about doing it again in 1982. Is that the same case or is it a different case?

MR. SMALL: Let me make clear to the court I am talking about right in this same September, October, November of 1976 time. The indictment alleges

that one after another after another they found laborers' union pension funds, health and welfare funds, and diverted those assets to their own companies and their own agencies.

What we are saying is that in September, October, and November of 1976 they were continuing this pattern with another laborers' union fund. There were conversations between co-defendants, between co-conspirators.

There was in fact a trip by a co-conspirator in furtherance of that. We allege in overt act No. 27 of the indictment conversations between one defendant and Joseph Houser regarding plans for future insurance activities. We did not include a more specific date in there, but those conversatons continued right through October.

This pattern of checks continued right through November. It started back

in --

THE COURT: Now, you would attempt to prove that one or more of the defendants had a conversation about future plans to violate the law; is that it?

MR. SMALL: About a plan to continue this scheme, these same insurance companies to continue this scheme and just add another union to it. It is a building, it is a Ponzi scheme, to really look at the basics.

THE COURT: It is a what?

MR. SMALL: Mr. Travaline and I are from Boston, and the old Boston Ponzi scheme is where you use the money from one source to pay another source.

THE COURT: A Ponzi scheme?

MR. SMALL: And that's it, a building scheme of getting one union after another union after another union involved and using the funds from one

union to pay all the expenses -- to use some caution -- pay all the expenses of getting the last union in and of getting the next union, and there is no division.

There was no division in these defendants' minds between, "All right. We are done with this union. Now let's go out and start a new conspiracy and find a new union, and now we are done with this union, let's go out and find another union."

The whole scheme in fact depended, and testimony will show it depended, on getting more unions in, because there weren't legitimate expenses here. The expenses went to payoffs, and that's in the indictment.

THE COURT: But you don't know about any of those, except for four years or - I mean the last of all these conversations that you have occurred

four years and ten months ago.

MR. SMALL: Somewhere around the fall or winter of 1976 the thing fell apart; yes, Your Honor.

THE COURT: Okay. And so we know, because you have alleged, that the conspiracy ended in December of '77 -- '76, excuse me -- so therefore you are talking about conversations in October, November, and December of '76; and you say that you would have evidence that would tend to show that the defendants or some of them got together in those three months and talked about bilking union funds.

MR. SMALL: Yes, sir.

THE COURT: And you say that the allegation that will permit you to offer that evidence is contained in paragraph 27 of the indictment, page 10? Overt act 28?

MR. SMALL: Yes, Your Honor; and in

the allegation that the scheme was to get money for the defendants by bringing in all of these unions. That was the scheme.

It was not a scheme to commit one -- it was not a bank robbery scheme where once the bank is robbed, that's the end of the scheme.

I just finished a little while ago trying a case in Georgia in front of Judge Tjoflat of the Eleventh Circuit. It was a RICO conspiracy --

THE COURT: He pronounces it Tjoflat, just like J.

MR. SMALL: I spent two or three weeks in front of him, and I kept alternating it back and forth, and the fact we ended up on good terms is probably a symbol of his forbearance.

THE COURT: He is not a bad guy. We were sworn in at the same time.

MR. SMALL: That case was a RICO

conspiracy. In fact, Mr. Travalini had another client who turned state's evidence in that case and was one of my favorite witnesses.

MR. HOGAN: We need a separate table here.

MR. SMALL: But that case was a RICO conspiracy involving drugs and corruption. That conspiracy didn't end when there was an agreement to smuggle drugs and it didn't end when the drugs were smuggled.

The object of the conspiracy was to get money for the conspirators, for these local county sheriffs, and the conspiracy didn't end until all the cash and twenties and fifties, as those cases usually go, was in their pockets. The same thing with a bank conversion, a bank fraud case.

THE COURT: I guess the defense would suggest that this conspiracy

ended when the cash, the money, was in the pocket of Mr. Le Pore or in his bank account.

MR. SMALL: There is a very, very major difference, because the accounts we are talking about are agency accounts or trust accounts. They are accounts that were set up, the government alleges, as conduit accounts. There are several of them.

The pattern in each account is identical, money put in Houser or by Houser's companies, and funneled by checks to cash and checks to these defendants, to them.

This account in particular was a trust account, set up by Mr. Le Pore. All the accounts were set up by the defendants; but the money from that conduit account, the money was not in Mr. Le Pore's pocket when it was in that trust account, in that conduit

account.

That is made clear by the fact that at that point he still felt he had to write a check to himself.

It is true, he signed the check to himself, but he was a signator on the trust account.

On your most basic bank conversion or bank fraud case, the offense is not finished when the fraudulent account or the conduit account is set up.

The offense is finished when the defendant has that money in his hand; and in these conduit accounts and in these agency accounts, the defendants did not have that money in their hands yet. It was well on its way, but it wasn't there yet.

THE COURT: Do you think that is a good analogy, really, if you take the same bank and you say that the vice-president of the bank stole a hundred

thousand dollars or embezzled a hundred thousand dollars and took it over to the Second National Bank and put it into an account in a co-conspirator's name or in his own name, wouldn't the offense be completed at that time?

I mean if he is in the same bank and he is trying to juggle accounts and he hasn't yet completed the act of getting control of the money, taking it out, but here the situation is, as you have alleged it, or the government, or whoever drew the indictment, I don't mean you personally, the government has alleged it, is that these people had a conspiracy where they were going to attempt to get money from union accounts to be diverted to their own personal accounts by a scheme or device of setting up phony or whatever insurance -- selling insurance to union funds; and once they had set up the insurance

company, once they had gotten the labor union to buy the insurance, once they had gotten the check from the labor union and once they deposited into their own account, what more needed to be done, except spend the money, which is overt act 28, I guess.

MR. SMALL: What I started out saying, Your Honor, is that overt act 28 is not talking about spending the proceeds. It is still part of a long chain of using conduit accounts and agency accounts to get the proceeds.

Until that check is written to Mr. Le Pore he doesn't have control personally. He doesn't have the cash in hand because it is part of a long series of conduit accounts, and part of a pattern by which they converted money from the checkoff of union members through this long series of companies and accounts to the pockets of these defendants.

So we are not talking about Mr. Le Pore then taking that $2,000 and going out and buying a TV set. That is not in the indictment.

The other point that I think needs to be made is that there is a difference between the offense being completed and the offense being finished.

In other words, yes, once the money has been bilked from union funds, there is an offense there; but in a conspiracy to make money for the defendants by doing this, by engaging in this pattern, the offense may be completed as a chargeable offense at one point, but it is not finished.

It is not over until the object of the conspiracy, which is putting money in the defendants' pockets, is finished; and that money from the union members' payroll doesn't turn into cash in Mr. Le Pore's pocket until all the conduit

accounts have been used, until the whole pattern has been gone through, and that check of $2,000 is cashed.

The evidence will show that this is the pattern that was used in I think some 17 different checks in this account; and I don't even know the number of checks in different other conduit accounts.

In this account the checks came before the October date, on the October date, and in fact I think there were two checks after the October date; but that is the way that the scheme was set up, and that's the way that they used to essentially conceal this conversion, the series of conduit accounts, which we have only now really been able to trace through and trace back to the Houser accounts and then back to the union accounts, and that's the essence of the conspiracy.

THE COURT: Okay. I think you have covered your points or I certainly understand your points from your brief and your arguments about the fact that you feel that you do not have to allege an overt act in this indictment; and that if you do, as you put it earlier, whether or not overt act 28, which alleges that on or about October 19, 1976 Le Pore wrote a check for $2,000 to himself out of funds provided in part by Joseph Houser, whether or not that is an overt act within the meaning of what is overt act in furtherance of a conspiracy.

MR. SMALL: I would simply finish by addressing the Court's attention to page 7 in our brief and the Castro and Maguire cases, both Fifth Circuit cases, which set out the requirement or explain the nature of an overt act in an ongoing offense, and explain that it is

not an advancement of the offense. It is simply a way of showing that this ongoing conspiracy is still ongoing.

Thank you.

THE COURT: Thank you, sir.

MR. HOGAN: Your Honor, Mr. Beeler and I represent Arthur E. Coia, and as you can expect, I am sure, we briefed for the magistrate and the government briefed for the magistrate and the magistrate ruled.

Of course, we would rely on the magistrate's ruling which we think is correct. I would point out to the Court with due respect to the government and to the Court we are not talking about evidence that might be proved here.

We are talking about the pleadings in the indictment, as to whether or not the pleadings allege sufficient material to get it past the statute of limitations.

If you would allow Mr. Beeler, he would make about a ten-minute rebuttal on some points in the government's evidence.

We have filed this jointly or the other defendants have adopted it. I do not know if they wish to speak to the motion, but a short rebuttal from Mr. Beeler as to what the government has said, if you please.

THE COURT: You mentioned other defendants. We all clearly understand that --

MR. HOGAN: Except Mr. Patriarca.

THE COURT: The Defendant Patriarca has been severed and his case is pending in Rhode Island.

MR. HOGAN: Correct, Your Honor.

THE COURT: So we are only talking about, I believe, Mr. Coia --

MR. HOGAN: Mr. Coia, Mr. Le Pore, and Mr. Vaccaro.

THE COURT: And Mr. Coia, Jr., two Mr. Coias.

MR. HOGAN: Yes, Your Honor.

MR. TRAVALINE: Just for clarity, to correctly indicate, I do not represent any present judge who turned state's evidence.

THE COURT: All right. Mr. Beeler.

MR. HOGAN: State or federal.

MR. TRAVALINE: State or federal.

THE COURT: Actually, as a matter of fact, I am supposed to be -- this the totally irrelevant to anything -- but Judge Tjoflat and I in the interest of saving a little money, are sharing a room tomorrow night and the next night in Washington and having dinner together.

I will tell him of your caveat that you disassociate yourself from that, and I will tell him of your insistence, and I will find out from

him, which will take about two hours the way he talks.

MR. SMALL: He will certainly remember the witness, Your Honor.

MR. HOGAN: You will be late for dinner, Your Honor.

THE COURT: No, no. He always makes dinner on time, but he will keep talking right through dinner.

Mr. Beeler.

MR. BEELER: Your Honor, the first question which you raised was the question of whether or not RICO, a RICO conspiracy, requires an overt act.

I think that one way of approaching the question is to look at RICO in the history of courts construing RICO.

In this circuit the Elliott decision is often thought of as being the Emancipation Proclamation for RICO, and there is the famous words "RICO to the rescue."

The Court of Appeals in Elliott realized that it was struggling with a rather novel statute which stretched criminal liability for associational behavior further than it had ever been stretched before.

The Court realizing, I believe, the constitutional problems that were implicated, held that RICO required an individual to be guilty of conspiracy, to personally agree to commit -- two predicate offenses, that is the agreement, which is what Elliott was looking at.

As a matter of fact, they reversed the conviction of Elliott, although they affirmed the convictions of others. They didn't find a sufficient agreement to the entire overall conspiracy that was in question.

THE COURT: Was that judge in Macon's Georgia's decision?

MR. BEELER: I think it was Judge Simpson's decision, if I'm not mistaken. The trial court judge was the judge from Macon, Georgia.

THE COURT: Yes. I am sorry. I tend to think of them and identify them by their -- oh, Judge -- it is on the tip of my tongue.

In any event, the Elliott case was the first one.

MR. HOGAN: Judge Smith in Waco.

THE COURT: No, no. It is the judge from Macon, Georgia.

MR. BEELER: Wilbur Owens.

THE COURT: Judge Wilbur Owens of Macon, Georgia, presided over the Elliott trial; Judge Simpson wrote the opinion.

MR. BEELER: Yes, sir. The Fifth Circuit followed the Elliott decision in Diecidue, D I E C I D U E, and again reversed the conviction of some of the

defendants, based upon a construction of RICO which had rigorous requirements of an agreement because of, I'm sure, concerns about the breadth of the statute.

By the time that we get to Sutherland, the court goes back and looks at Elliott. Again, in Sutherland the court is construing RICO, and it is looking to some of the language in Elliott about joining disparate conspiracies, and the concept perhaps that multiple conspiracy law has been overruled, and Sutherland sort of straightens that part of Elliott out.

Therefore, what the Court of Appeals says in Sutherland about what RICO requires is important, because it is construing RICO, and it is construing RICO in the face of other Fifth Circuit decisions, which likewise have struggled with RICO.

Again, in Phillips, as Your Honor knows, the Court in discussing what RICO requires is talking about the sufficiency of evidence, and although I gather from the facts in the Phillips case it was clear that an overt act was committed and the Court in fact had a situation where the defendant hadn't personally committed an overt act, again the reliance upon Sutherland and the statement that RICO requires for a conspiracy to be committed an overt act by one of the conspirators is not to be lightly tossed aside. It is not part of the holding, but I think it is an important statement of what the law is.

As to what other circuits have said, the Tenth Circuit has stated that RICO conspiracy requires that the conspirator whose own complicity is in question must actually have committed predicate crimes. That's the Karas

case, K A R A S, cited in our memo; and I believe it is 624 F.2d.

The question of what RICO requires is controversial and it goes both ways. There are courts who place more rigorous requirements on it than the Fifth Circuit and now the Eleventh Circuit, and there are cases which have placed less rigorous requirements on it.

Considering that it is fairly controversial because of the novelty of RICO, as the court said in Diecidue, RICO is unique. Almost every court which has struggled with sufficiency of the evidence problems in RICO cases has talked about this extraordinary statute and how it has to be carefully interpreted and how the evidence has to be looked at very carefully because of the vast expansion of potential criminal liability.

Therefore, it just seems that the Fifth Circuit was not speaking in dictum; that it was speaking reasonably and what it said ought to be followed.

I would add that even if RICO did not require an overt act as an element, it really doesn't solve the problem, because even where statutes don't require an overt act as an element, the traditional way of measuring when a conspiracy has come to an end is to measure it by the last overt act manifesting that it is at work.

This is the way that the statute of limitations of cases go, and I don't know of any other reasonable standard for testing whether or not the statute of limitations has run. The law and logic both require that you would look at the last overt act.

Going on to the question of whether the overt act alleged here is a sufficient overt act, I would like to perhaps clear the air just a little bit about this conduit talk.

The government has alluded both in their memo and their argument here to that there was a pattern of using conduits to get money to people. In their brief they refer to paragaphs 10 and 11 of the indictment.

Paragraph 10 on page 6 says that they set up a company known as National Group for the purpose of being a conduit to disguise kickback of money.

It says in paragraph 11 that they set up Northeast for the purpose of being a conduit to disguise kickback money.

The court will see that overt act

28 does not allege that anybody wrote a check on either Northeast or National Group. The evidence will show that. We have the check produced in discovery. The check says Albert J. Le Pore, attorney-at-law. He writes the check to himself and on it it says "loan".

MR. HOGAN: In that regard, while we are not getting into the evidence, the government provided us with a check and with the account on People's Bank, and it is not a trust account. It is Albert J. Le Pore, Attorney.

Copy of the check was their Grand Jury Exhibit No. 22, which was submitted on 9-23-81, the day the indictment was returned in this case, and the check is made to Albert J. Le Pore, attorney. It is not a trust account.

MR. BEELER: We are telling you this because you asked what the govern-

ment's evidence at trial would be. It is clear the indictment doesn't allege any facts from which the court could hold that this writing of a check for $2,000 to himself is in furtherance of the conspiracy, but we want the Court to know that we are talking about substance.

The check is an attorney-at-law check, written to himself. It has nothing to do with the conduits alleged in the indictment.

THE COURT: Do you have a copy of that check?

MR. HOGAN: Yes, I do, Your Honor. I have a copy of the People's Bank account for October 29, showing the $2,000 check on People's Bank account to Albert J. Le Pore, attorney. I have a copy of the front and back of Albert J. Le Pore, $2,000 check of October 19, I presume it is 1976. Their Xerox copy

didn't copy. Maybe I could show it to Mr. Hyatt and make sure. The back of it is their Grand Jury Exhibit No. 22.

MR. SMALL: It is '76.

MR. HOGAN: This is October 19, 1976. You can see it is a --

THE COURT: That is the check we are talking about in --

MR. HOGAN: Overt act No. 28.

THE COURT: 28. Thank you. The clerk will make these two just as exhibits to this little hearing. In a moment she'll mark them as Defendants' 1 and 2 for this hearing, just so we have them.

Go ahead, Mr. Beeler.

MR. BEELER: Mr. Small argued in that the government would prove some other things at trial which are not alleged in the indictment. I don't know whether the Court wants me to get into those or not.

I would just as soon stick with the face of the indictment, but I am here to satisfy the Court.

THE COURT: Well, when I reviewed this matter and looked it over and read the magistrate's report, the thought occurred to me that the government should be given an opportunity to address the point as to whether or not there is any evidence that they have which would constitute proof of an overt act within the five-year statute of limitations time.

We have narrowed it down now to about a two-and-a-half month period. They say the conspiracy ended in December of '76, they allege that in the indictment; and they are bound by that and they accept that and we all accept that.

So we must then look at the period of time before December of '76 to see if

there is any overt act alleged in this indictment.

The government relies on overt act 28, which we are all familiar with, and they say overt act 27 in their oral argument here today.

What I asked the government, and if you wish to comment on it you may or whatever you wish to do, I asked the government what proof they would have at trial; and they suggest that in addition to the check they would have conversations of future illegal activity. Not past, but future.

That's what they have alleged and I presume that's what they will prove. At least, I am sure if they attempt to prove anything beyond the indictment there would be a proper objection and it would have to be sustained; so they are bound by their proof to the pleadings.

It is all interwoven, but they do

say they will have some conversations apparently about some future insurance activities; that Coia spoke by telephone with Mr. Houser in September of '76 regarding the Securities & Exchange Commission's investigation and plans for future insurance activities. That's the totality of what they rely on.

MR. BEELER: If they had proof of such conversations occurring within the statute of limitations they should have pled it.

In or about September of 1976 is not within the statute of limitations. Beyond that I can't respond. We don't have the statements of Mr. Houser, but the indictment certainly doesn't plead any discussions about plans for future insurance activities occurring within the statute of limitations. It is ambiguous at best on the subject.

Your Honor had a hypothetical

concerning someone who had diverted money from a union trust fund or pension fund and put it in an account and then fifty years later wrote a check, and I think that Mr. Small's response to that hypothetical is fairly telling.

Rather than concede that that prosecution would be time barred, he said something which I would like to find my notes of his response. He said that they could still prosecute in the year 2032 if they had evidence and the government alleged that the conspiracy continued for the fifty years. Yes, we could prosecute.

Then the question is, what have they alleged here, and the answer is they haven't alleged here anything more than in the hypothetical; that is to say, they have alleged here that somebody took some of the money after they already had possession of it. They

wrote a check to themself. That was your hypothetical.

They didn't argue in response to the hypothetical that signing that check in 2032 would start up the prosecution and breathe life back into it. Instead, their answer was if there were things intervening to keep the statute alive to show the conspiracy was going on; but we don't have that we don't have anything within five years other than overt act 28.

So I think if you look hard at their answer to your hypothetical, the real answer is we just can't prosecute the person based upon something like overt act 28 or based upon your hypothetical, writing the check out of the diverted funds. It just doesn't suffice as an overt act in furtherance of the conspiracy.

In their memo the government talked

about conspiracy withdrawal law and an argument -- they talked about requirement of things being in furtherance of the conspiracy.

I just would caution the Court if you study these questions that what is in furtherance of a conspiracy for purposes of evidence law is not necessarily what is in furtherance of a conspiracy for purposes of tolling the statute of limitations, and we would stick with the cases that we have cited in our memo.

I think that the cases and evidence law, and more particularly cases construing Rule 801(d)(2)(e) of the Federal Rules of Evidence, dealing with declarations in furtherance of a conspiracy, would likewise support us; but they really are not on point. They are not statute of limitations cases. Different policies are involved.

The rules on admissibility of evidence are one set of rules. The rules on statute of limitations are another set of rules, and I would like to sort of close with what the government started off with in their brief.

The government warned the court that dismissing an indictment is a drastic remedy, one of the most drastic remedies under the law, and cited cases saying that the Court should be cautious in doing so and do so only as a last resort.

Well, you know, those cases are good, I suppose, for making judges be cautious; but they are cases involving governmental misconduct where cases were dismissed on supervisory power grounds or due process grounds because of governmental misconduct; and the Second Circuit Court of Appeals says you have to be careful doing that.

We are talking about statute of limitations. Congress has said it is good to dismiss cases when they are so old that they can't be tried properly. It used to be the statute of limitation was three years. It is five years now. RICO stretches things a bit, but it is still five years.

Congress knows, everybody knows, that if the government waits too long it is hard to get a fair trial. We are talking about Congressional policy. We are talking about a statute that the Supreme Court has authoritatively construed.

In the Tussi case the Supreme Court said that statutes of limitations should be construed liberally in favor of repose. That is the rule. It is not a drastic remedy. It is an approved remedy, and the Court shouldn't hesitate to dismiss an indictment where no overt

act is properly pleaded within the statute of limitations.

THE COURT: All right. Do any of the other counsel for defense wish to add anything?

MR. TRAINI: Your Honor, just a couple of points that didn't seem to be covered. With respect to the status of the law in some of the other circuits, I think that it was mentioned by Mr. Small that in the Second Circuit something to the effect that the overt acts were not required to be alleged or proved, and the Court inquired as to what other circuits might have said on the subject.

I think from my understanding of the Phillips decision, the Phillips Court seems to read that two Seventh Circuit cases, United States versus Starnes and United States versus Witherspoon, as requiring some allegation and proof of overt activity.

Also, Your Honor in the First Circuit in United States versus Winter, the very recent First Circuit case, 663 F.2d 1120, my reading of that case indicates that it requires allegation and proof of an overt act, which there was in that case.

As far as the government's allegation as it was crystallized, so to speak, by Your Honor's comments is concerned, with respect to overt acts 27 and 28 I think the magistrate, Your Honor, pretty well disposes of overt act 28 by reference to the Forsythe decision and the failure of Congress to enact Subsection E to Section 1962, which would have accounted for the type of activity the government is now talking about, which covers the hypothetical that Your Honor raised about distribution of the money.

It was clearly the intent of

Congress to utilize that extended time provision that is similar to one found in the unenacted Subsection E in the Bankruptcy Concealment statute of limitations in 128 U.S.C. 3284. Clearly that covers whatever might have taken place in overt act 28.

As far as overt act 27 is concerned, Your Honor, I agree with what Mr. Beeler and Mr. Hogan said, that in fact there was an unspecified date there. At best, as Mr. Beeler said, it is ambiguous; but furthermore, Your Honor, I think the rest of the evidence that the government has given to us and other evidence that we have been able to get by way of discovery in the case indicates that those conversations or the conversation that is alleged to have occurred in overt act 27 took place in August, not in September.

There is some evidence that Mr.

Houser had a conversation with someone and in fact it was in August and in fact it was immediately after Mr. Houser was called to testify before the Securities & Exchange Commission.

Their records indicate that he testified in August, and in fact the rest of the evidence, Your Honor, indicates that Mr. Houser was not even in the United States during September and October of 1976; that he was in Israel and Japan.

MR. SMALL: Your Honor, I am going to have to object. First of all, there is no evidence to that. Second of all, it simply is not true. Mr. Houser was in this country, and the conversations we are talking about are September and October, and we are trying the case before the case should be tried.

THE COURT: Would it matter if it was August? That still is within the

time, is it not?

MR. TRAINI: August is not, Your Honor.

MR. SMALL: August is not.

MR. TRAINI: Actually, Your Honor, the question is September 23.

THE COURT: I agree with counsel that we don't want to get into the facts of the case at this point in time. I wanted to get the government's position with respect to the magistrate's report and recommendation, and I did ask them if they had anything, and they are saying, "Why, sure, Judge. We have plenty of evidence that, you know, four years and six months before we filed this indictment they all sat around a table and did this that and the other thing or whatever," but they rely on what is in the complaint.

MR. TRAINI: I would just simply say, Your Honor, that the magistrate

went through the legal questions. As Mr. Beeler noted, it is a matter of pleading in the indictment, and in fact the indictment should be dismissed because it does not allege something that occurred within the five-year limitation period.

MR. LEPPO: I have nothing, Your Honor.

MR. TRAVALINE: Your Honor, I don't think there is anything I could add to what has been said that would advance the discussion or shed anymore light on it.

I think only the opinion of the magistrate is a very straightforward, concise, and documented position; and I think that for the reasons that Mr. Beeler has alluded to and observed to the RICO statute, that the Court was not just wasting its time but was struggling to give further definition to

a crime that in the minds of many people, as you know, defies definition; and I would suggest that for all the reasons that have been advanced it is perfectly appropriate. The rules recognize it is right for you to consider this motion at this stage of the proceeding.

MR. SMALL: I have two very brief points in rebuttal, Your Honor. First of all, as to the overt act requirement, the RICO statute has been on the books for some 12 years now, and there have been literally hundreds of cases tried under it; but somehow every RICO case that I get invoved in, I hear the argument it is such a new and novel statute that every pronouncement on the statutes is written in gold.

The Sutherland discussion, if you can call it that, of overt acts --

and it is only a passing reference -- is in footnote four, which simply goes through the general conspiracy law.

That, set against the statements of the Second Circuit which don't just set out general conspiracy law, they say -- Section 271 and Section 1962 D define distinct offenses which are separately punishable in part because Section 1962 D does not require proof of an overt act and Section 371 does.

Second of all, Mr. Beeler stated that whatever this ongoing pattern of new unions and new union funds, we didn't allege it in the indictment.

Well, paragraph 14 of the indictment very clearly alleges it. It says:

> "It was further part of the conspiracy that the defendants would agree to and support the operation of a kickback scheme

involving services rendered to the laborers' union initially in Florida and eventually nationwide in return for payments of money."

And I would simply quote to the Court from page 3 of our brief:

> "Any statute of limitations objection not found on the face of the indictment would present factual issues inextricably interwoven with the merits of the case which are more properly left to trial."

That's the Kearny case and the Andreas case and other citations in the brief.

That is exactly the situation we have here. We have an overt act alleged in the indictment to be in furtherance. The law is that if you have an overt act and you have an allegation that it is in furtherance of the conspiracy, that is the end of the

pretrial discussion; and the reason for that principle is, as Professor Wrights's quote that I quoted earlier and the Andreas case, which I just quoted, the reason is that otherwise you try a case five times.

You try it when you get the statute of limitations brought up initially. You try it during the trial. You try it afterwards when you review the statute of limitations.

It is obvious to me that everyone who has spoken has had to get into the evidence of the case, and not just one little part of the evidence that we could call a quick witness and dispose of.

All of the evidence and the nature of the pattern and the nature of these payments and the nature of this account, it is all matters for trial; and Professor Wright, the Andreas case, all of

the cases cited in our brief clearly set out that that's the reason why an indictment is taken on its face; and the allegation of an indictment that an overt act is in furtherance of the conspiracy is taken as true, and that's why you have the on such-and-such a date, John Doe, defendant, picked up a brown paper bag, and that's a proper overt act, because the indictment says it is in furtherance of the conspiracy.

Here we have provided more information than that. Maybe that was a mistake. Maybe instead of having an informative indictment we should have just said on such-and-such a date X talked to Y and left it at that; but don't punish the government for making an indictment say more and explain more than some of the form, routine indictments. You see now, this indictment is proper on its face and it should be

presented to a jury for trial.

THE COURT: All right, gentlemen. I'll reread your briefs and memorandums which I have not looked at for a little over a week and prepare an order and you will receive it in the mail, probably within a few days.

MR. HOGAN: Thank you, Your Honor.

MR. SMALL: Thank you, Your Honor.

(Hearing concluded.)

[ORDER OF THE UNITED STATES

DISTRICT COURT]

Entered on March 12, 1982 in

Case No. 81-417-Cr-JLK

This matter is before the Court on review of the Report of the United States Magistrate, which recommended that these indictments be dismissed because the only overt act alleged which occurred within the five year statute of limitations was not in furtherance of the charged conspiracy. The Court held a hearing on Wednesday, March 10, 1982, and heard oral arguments by the parties. Based on those arguments and the written memoranda submitted herein, the Court hereby agrees with the Magistrate, and holds that these Indictments must be dismissed.

The Court finds the Magistrate's Report to be thorough and concise, so it is not necessary to repeat all the relevent facts in this Order. This Court merely adds the following in holding that these indictments are barred by the statute of limitations.

The applicable statute of limitations is contained in 18 U.S.C. § 3282, which provides: "[N]o person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found . . . within five years next after such offense shall have been committed." The statute begins to run when the crime is complete. See, Toussie v. United States, 397 U.S. 112 (1970). If five years pass between the time the crime is complete and the date the indictment is returned, the prosecution may not go forward.

The Indictment charges the defen-

dants with a violation of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962(d). Section 1962(d) makes it unlawful to conspire to violate 18 U.S.C. § 1962(c). Section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." Section 1961(5) of title 18 defines "pattern of racketeering activity" to mean at least two acts of racketeering activity within a ten year period. The Indictment alleges that the RICO conspiracy took place from 1973 until in or about December 1977. It lists twenty-eight actions here, labelled "Overt Acts," which were

allegedly committed in furtherance of the racketeering conspiracy.

The question before the Court is what facts the Government must allege under the RICO conspiracy statute to bring the Indictment within the five year statute of limitations. The only act in furtherance of this conspiracy which is alleged to have occurred later than five years before this Indictment was brought is "Overt Act" 28. Overt Act 28, in its entirety, is as follows: "On or about October 19, 1976, defendant Albert J. LePore wrote a check for $2,000 to himself out of funds provided in part by Joseph Hauser.

At oral argument, counsel for the Government took the position that the motion to dismiss was premature since, at trial, it could connect Overt Act 28 with the rest of the alleged conspiracy and thereby bring the entire conspiracy

within the five year period.[1] On questioning, counsel argued that Act 28 was "in furtherance" of the conspiracy because the object of the conspiracy was "to obtain money for the defendants and co-conspirators" through the racketeering conspiracy. Counsel suggested that spending the ill-gotten funds was accomplished by drawing the check (in Act 28) and that this act furthered the conspiracy.

The Government argues that "in furtherance" should not be construed literally to mean "in advancement" of the conspiracy. It refers to cases in which the Fifth Circuit has held that for purposes of admitting into evidence

1. The Government argues that the factual inquiry triggered by the question of Act 28's relation to the entire conspiracy demonstrates that this is an issue to be decided after trial for purposes of judicial economy. To allow the trial to go forward pursuant to a deficient indictment would be not only uneconomical, but unfair as well.

statements by co-conspirators "in furtherance" of a conspiracy under Fed. R. Evid. 801(d)(2)(E), the term should not be applied too strictly. See, United States v. McGuire, 608 F.2d 1028, 1032 (5th Cir. 1979); United States v. James, 510 F.2d 546, 549 (5th Cir. 1975). But the Fifth Circuit expressly avoided interpreting the term literally because to do so would undercut the purpose of the evidentiary exception -- that statements by co-conspirators are reliable and should be admitted into evidence. The same reasoning does not apply in determining what acts the Government must allege occurred within the statute of limitations period. For purposes of the limitations period, the indictment must allege some act, of racketeering or otherwise, which was in advancement of the purpose of the conspiracy, which

occurred less than five years from the date of the indictment. The writing of a check by one defendant from his personal account did not advance the purpose of the conspiracy alleged in this case, which was to obtain money through kickbacks from insurance companies and pension funds. This Court agrees with the Magistrate, that what one defendant "did with the funds would not be in furtherance of the conspiracy but rather a use of the fruits of the conspiracy." Use of the fruits of a conspiracy does not extend the period of the crime for statute of limitations purposes. United States v. Forsythe, 560 F.2d 1127, 1134 (3d Cir. 1977).

The Government also argues that Overt Act 27 listed in the Indictment is part of the RICO conspiracy and occurred within five years of the Indictment. Act 27 alleges, in its

entirety: "In or about September 1976, defendant Arthur E. Coia spoke by telephone with Joseph Hauser regarding the Securities and Exchange Commission's investigation and plans for future insurance activities." There are two reasons this allegation fails to permit this Indictment to go forward. First, as the Magistrate pointed out, the vague allegation of activity "in or about September 1976" does not adequately allege that the conspiracy to engage in a pattern of racketeering activity occurred between September 23, 1976 and the date of this Indictment, September 23, 1981. Certainly, if the Government had sufficient information to allege the events were timely, it would have done so when given the opportunity when it presented the Indictment to the Grand Jury.

Second, even if the "Overt Act"

were alleged to have occurred within the limitations period, the facts alleged therein are insufficient to allow the Government to prove these conversations at trial. At the hearing, counsel represented that the Government would prove, per Act 27, that the defendants and co-conspirators discussed possible future illegal insurance schemes. The Government argued that future plans were part of the previous schemes because of the nature of such patterns of racketeering, in which the benefits of one fraudulent scheme are used to fund future schemes.

The Court holds that an allegation that two people spoke by telephone regarding "plans for future insurance activities" does not sufficiently allege an act which was part of the continuing offense. The Government did not allege that the two discussed "illegal" in-

surance plans. Where an indictment alleges a non-criminal act, it must explain how the act was in furtherance of a continuing criminal enterprise. If the Government contemplates proving such a connection between a phone conversation and a previously ongoing racketeering enterprise, it should expressly state the connection in the Indictment. The Indictment in this case does not adequately allege such a connection to make this allegation provable at trial.

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the Indictment is barred by the statute of limitations, 18 U.S.C. § 3282, and that it be, and the same is, hereby dismissed.

DONE and ORDERED in chambers at the United States Courthouse, Miami, Dade County, Florida, this 12th day of March, 1982.

/s/ JUDGE JAMES LAWRENCE KING
U.S. DISTRICT JUDGE

cc: Martin K. Leppo
James J. Hogan
Joseph Beeler
Joseph T. Traveline
John F. Cicilini
Daniel I. Small

[OPINION OF THE UNITED STATES COURT

OF APPEALS

FOR THE ELEVENTH CIRCUIT]

Entered on November 17, 1983

Case No. 82-5369

Before TJOFLAT, VANCE and CLARK, Circuit Judges.

TJOFLAT, Circuit Judge:

The United States appeals the dismissal on statute of limitations grounds of an indictment alleging that Arthur A. Coia, Arther E. Coia, Albert J. Le Pore, and Joseph J. Vacarro, Jr., violated the conspiracy portion of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1962(d) (1976).[1] We reverse.

1. Title 18 U.S.C. § 1962(d) provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of [18 U.S.C. § 1962]."

I.

On September 23, 1981, a federal grand jury in the Southern District of Florida charged the four appellees and one other defendant in a one-count indictment, alleging that they had conspired to engage in labor racketeering, in violation of 18 U.S.C. § 1962(d).[2] The indictment alleged that the five defendants conspired to use their influence over the Laborers International Union of North America and its subordinate bodies and affiliated employee benefit plans. According to the indictment, the conspirators funneled the union's insurance and service business into insurance and service companies they had set up, and then charged the union members for the most

2. The fifth defendant, Raymond L.S. Patriarca, was served by the district court and is not a party in this appeal.

expensive form of insurance. The conspirators thereafter looted the insurance premiums through the use of kickbacks, payoffs, unearned salaries and fees. and improper personal expenses.

Prior to the trial, the appellees moved to dismiss the indictment, claiming in part that the indictment was not brought within the five-year statute of limitations period. The district court referred the matter to a magistrate for preliminary consideration and a report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B) (1976 & Supp. V 1982). After receiving the magistrate's report the court heard argument thereon and on March 12, 1982, adopted the magistrate's recommendation and dismissed the indictment. The government then filed this appeal.

The district court's dismissal was based on the following chain of reason-

ing: first, a conspiracy under RICO requires for its completion the performance of at least one overt act; second, for statute of limitations purposes, the conspiracy will be deemed to have been completed at the time of completion of the last overt act; third, the only overt act alleged in the indictment that clearly fell within the statute of limitations period (overt act No. 28) was insufficient on its face to satisfy the requirement that it be in furtherance of the conspiracy. Therefore, the court concluded that as a matter of law the indictment failed to satisfy the statute of limitations and should be dismissed.

II.

The government presents three alternative grounds for reversal: the district court erred in resolving prior to trial the factual issue of whether

the conspiracy continued into the statute of limitations period as alleged in the indictment; the district court erred in concluding that a RICO conspiracy requires an allegation and proof of an overt act as an element of the crime; and the district court erred in determining that overt act No. 28 as listed in the indictment was not in furtherance of the conspiracy. The United States alleged, as overt act No. 28, that on or about October 19, 1976, defendant Le Pore wrote a check for $2,000 to himself out of funds provided in part by Joseph Hauser. The account was in the name of "Albert J. Lepore Attorney." In his argument to the district court, the prosecutor stated that the conspirators used this account to convey the impression that the funds represented remuneration for legal services and, therefore, that this was

part of the "laundering" process of the kickbacks involved in the RICO violation, thereby constituting an act in futherance of the conspiracy.

[1,2] The government's three grounds for appeal are each, if correct, individually sufficient to justify reversal of the district court. With regard to the first, the government is in error concerning the propriety of the district court's dismissal of the indictment prior to trial. It is perfectly proper, and in fact mandated, that the district court dismiss an indictment if the indictment fails to allege facts which constitute a prosecutable offense.

Rule 17.1 of the Federal Rules of Criminal Procedure grants the court the power to hold pretrial conferences, "to consider such matters as will promote a fair and expeditious trial."

This rule is essentially a codification of the court's inherent power to manage the litigation before it. Rule 17.1 operates in conjunction with rules 12(a) & (b) which grant the defendant the right to make certain motions prior to trial. The advisory committee notes to rule 12(b) (subdivisions (1) & (2)) list, among other things, insufficiency of the indictment under the applicable statute of limitations as specifically capable of determination prior to trial. Rule 12(e) requires that the court make a pretrial determination on these pretrial motions unless there is good cause not to do so. Rule 12(e) further states that "[w]here factual issues are involved in determing a motion, the court shall state its essential findings on the record." This clearly indicates that findings of fact as well as of the law are within

the province of the district court to make in pretrial proceedings.

Therefore, in this case, we need not explore whether the district judge's determination that overt act No. 28 could not constitute an overt act in furtherance of the conspiracy was one of law or a combination of law and fact. Either determination was permitted, indeed mandated, by the Federal Rules of Criminal Procedure.

III.

[3,4] The problem with the district judge's dismissal of the indictment is not that it was beyond his authority, but rather, that it was based on an erroneous notion of the substantive law. The district court's holding that a RICO conspiracy charge requires an allegation of an overt act was based on a reasonable, through incorrect,

adoption of dicta from earlier Fifth Circuit cases.[3] In United States v. Phillips, 664 F.2d 971, 1038, (5th Cir. Unit B 1981), cert. denied sub. nom. Meinster v. United States, 457 U.S. 1136, 102 S. Ct. 2965, 73 L.Ed.2d 1354 (1982), the court stated that "some overt action by one of the conspirators in furtherance of the conspiracy," must be proved in order to satisfy the requirements of 18 U.S.C. § 1962(d). The sole support offered by the Phillips court for this proposition was a citation to a footnote in United States v. Sutherland, 656 F.2d 1181, 1186-87, n. 4 (5th Cir. 1981), cert. denied, 455 U.S. 949, 102 S. Ct. 1451, 71 L.Ed.2d 663 (1982). In neither case was the

3. In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this circuit adopted as precedent the decisions of the former Fifth Circuit decided prior to October 1, 1981.

proposition necessary for the holding. Tracing this line of cases back further to its origin, we find that Sutherland offers as its sole support for the overt act requirement, United States v. Fuiman, 546 F.2d 1155, 1158 (5th Cir.) cert. denied, 434 U.S. 856, 98 S. Ct. 176, 54 L.Ed.2d 127 (1977). In Fuiman, the court held that in a conspiracy case brought under the Drug Control Act, 21 U.S.C. §§ 952 & 963, an overt act is required. Fuiman was not a RICO prosecution; therefore, it is not on all fours with the instant case. It is similar however, in that 21 U.S.C. §§ 952, 963, like the RICO conspiracy statute, makes no reference to an overt act as an element of the crime. In citing the "'overt act' requirement of the federal conspiracy statutes," Id., the Fuiman court implied that such an element is implicit in 21 U.S.C. §

952.

Whether Fuiman requires us to read an overt act requirement into the RICO conspiracy statute is a question we need not address, because in United States v. Rodriguez, 612 F.2d 906 (5th Cir. 1980) (en banc), cert. denied sub. nom. Albernaz v. United States, 449 U.S. 835, 101 S. Ct. 108, 66 L.Ed.2d 41 (1980), the court held that an overt act is not essential to a conspiracy charge under the Drug Control Act.[4] Thus, the chain of reasoning which supports the assumed overt act requirement in RICO cases in this circuit is without support and must fall of its own weight.

The only appellate court to have

4. The court stated:

> We recognize some confusion in the Circuit as to whether an indictment charging a conspiracy to violate the Drug Control Act must set out and the Government must prove at least one overt act. Consistent with the majority of our decisions we now expressly hold that these indictments do not require allegation or proof of an overt act. Rodriguez at 919 n. 37 (citations omitted, emphasis in orginal).

faced the question of whether a RICO conspiracy requires an overt act is the Second Circuit Court of Appeals. In United States v Barton, 647 F.2d 224, 237 (2d Cir. 1981), cert. denied, 454 U.S. 857, 102 S. Ct. 307, 70 L.Ed.2d 152 (1981), the court held that "[w]hile the general conspiracy statute [18 U.S.C. § 371 (1976)], requires proof of an overt act, the RICO consiracy [statute] does not."

This Second Circuit holding is both eminently reasonable and consistent with the Supreme Court's holding in Singer v. United States, 323 U.S. 338, 340-42, 65 S. Ct. 282, 283-84, 89 L.Ed. 285 (1945), in which the Court concluded that because the particular conspiracy statute it was construing, did not, on its face, require an overt act, no overt act requirement should be implied. The Court noted that this was consistent with the common law of conspiracy. Nash

v. United States, 229 U.S. 373, 378, 33 S. Ct. 780, 782, 57 L.Ed. 1232 (1912).

IV.

[5] The applicable statute of limitations provides: "[N]o person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found . . . within five years after such offense shall have been committed." 18 U.S.C. § 3282 (1976). The statute begins to run when the crime is complete. See Toussie v. United States, 397 U.S. 112, 90 S. Ct. 858, 25 L.Ed.2d 156 (1970).

[6] It is the question of when a crime is complete that is the raison d'etre of our earlier inquiry into whether a RICO conspiracy requires the commission of an overt act. The Supreme Court in Fiswick v. United States, 329 U.S. 211, 216, 67 S. Ct. 224, 227, 91 L.Ed. 196 (1946), held that a conspiracy requiring an overt act

is deemed complete for statute of limitations purposes at the time of completion of the last overt act. This is a rule of statutory construction, rather than a factual determination of whether a conspiracy existed at a particular point in time. With respect to conspiracy statutes that do not require proof of an overt act, the indictment satisfies the requirements of the statute of limitations if the conspiracy is alleged to have continued into the limitations period. The conspiracy may be deemed to continue as long as its purposes have neither been abandoned nor accomplished. United States v. Grammatikos, 633 F.2d 1013, 1023 (2d Cir. 1980). See United States v. Kissel, 218 U.S. 601, 31 S. Ct. 124, 54 L.Ed. 1168 (1910).

Both in the indictment and at the pretrial hearing, the government consistently alleged that the conspiracy

continued well into the limitations period. It is clear from both the transcript of the pretrial hearing, and the order dismissing the indictment, that the district judge ignored this, fixing his mind and basing his holding exclusively on the nonexistence of a presumptively required overt act. There was not the slightest hint of an alternative holding that regardless of the overt act requirement, the government failed to allege sufficient facts to conclude that the conspiracy extended into the limitations period. Even if the district court had made such a holding, it is doubtful that we could affirm.

[7-10] Since both the conspiracy itself and its enduring nature may be proven circumstantially, United States v. Hamilton, 689 F.2d 1262, 269 n. 3 (6th Cir. 1982), cert. denied sub. nom.

Wright v. United States, ____ U.S. ____, 103 S. Ct. 753, 74 L.Ed.2d 971 (1983), any indictment alleging facts in the time period close to the commencement of the limitations period could support an inference that the conspiracy continued into the limitations period. Moreover, as the Sixth Circuit has said in a similar cae, "where a conspiracy contemplates a continuity of purpose and a continued performance of acts, it is presumed to exist until there has been an affirmative showing that it has terminated." United States v. Mayes, 512 F.2d 637, 642 (6th Cir. 1975), cert. denied 422 U.S. 1008, 95 S. Ct. 2629, 45 L.Ed.2d 670 (1975). Further, noting that (1) a grand jury has already found probable cause that a conspiracy continued into the statute of limitations period, and (2) discovery procedures in criminal proceedings are substantially

limited, the district court should not require the government to launder its evidence in the presence of the defendant prior to trial. The district court should approach with delicacy and circumspection the question of whether to dismiss a case on the ground that, at trial, the proof, as a matter of law, would fail to establish the commission of the charged offense within the limitations period.

Given that (1) the district court's dismissal of the indictment was based solely on a statute of limitations rationale; (2) the pretrial hearing was conducted, and the court's order of dismissal was written with an erroneous view of the law; (3) the indictment on its face satisfied the statute of limitations; and (4) the grand jury found probable cause to issue the indictment, we conclude that the dis-

trict court's order must be vacated and the indictment reinstated.

VACATED and REMANDED for further proceedings.

CLARK, Circuit Judge, concurring in part and dissenting in part.

I concur in the reversal of the district court's dismissal of the indictment. I agree with the majority that the indictment on its face satisfies the statute of limitations. I agree with the majority opinion that the RICO statute does not require an overt act and I agree to the correctness of United States v. Barton, 647 F.2d 224 (2d Cir. 1981) cert. denied, 454 U.S. 857, 102 S. Ct. 307, 70 L.Ed.2d 152 (1981).

The reason for my dissent is that, in my opinion, our court is bound by our holding in United States v. Phillips, 664 F.2d 971, 1038 (5th Cir. Unit B

1981), cert. denied sub. nom. Meinster v. United States, 457 U.S. 1136, 102 S. Ct. 2965, 73 L.Ed.2d 1354 (1982). The majority states that the holding in Phillips is dictum. The rule in our circuit requiring that we follow precedent does not make a distinction for holdings which are dictum. See United States v. Adamson, 665 F.2d 649, 656 n. 19 (5th Cir. Unit B 1982). The main reason for following dictum is the difficulty in determining what is and is not dictum. I believe that en banc consideration is required before the panel can overrule Phillips, supra.

[ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT]

Entered on January 20, 1984

Case No. 82-5369

Before TJOFLAT, VANCE, and CLARK, Circuit Judges.

PER CURIAM:

(X) The petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

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ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
United States Circuit Judge

[JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT]

Entered on February 17, 1984 in Case No. 82-5369

Before TJOFLAT, VANCE and CLARK, Circuit Judges.

J U D G M E N T

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, VACATED; and that this cause be, and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court.

November 17, 1983

CLARK, Circuit Judge, concurring in part and dissenting in part.

ISSUED AS MANDATE: February 17, 1984

Supreme Court, U.S.
FILED
APR 25 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1568

In the Supreme Court of the United States

OCTOBER TERM, 1983

ARTHUR A. COIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in reversing an order dismissing an indictment on the ground that it was not brought within the five-year statute of limitations period.

On September 23, 1981, petitioners were charged in an indictment returned in the United States District Court for the Southern District of Florida with conspiracy, beginning in 1973 and lasting at least until December 1977, to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), in violation of 18 U.S.C. 1962(d). The indictment alleged that petitioners and others conspired to use their influence over an international union, its subordinate bodies, and affiliated employee benefit plans to funnel the union's insurance and service business into insurance and service companies they had established. The indictment

also alleged that the conspirators thereafter looted the insurance premiums through the use of kickbacks, payoffs, unearned salaries and fees, and improper personal expenses (Pet. App. A1-A26).

On March 12, 1982, the district court, acting on a recommendation of a magistrate (Pet. App. A27-A40), dismissed the indictment as being barred by the statute of limitations. It ruled that the RICO conspiracy required an overt act, that such a conspiracy was deemed to be completed at the time of the last overt act, and that the only overt act alleged within the limitations period was insufficient to be in furtherance of the conspiracy (Pet. App. A118-A128). The court of appeals reversed. It concluded that an overt act is not essential to a conspiracy charge under the RICO statute and that the indictment on its face satisfied the statute of limitations (Pet. App. A129-A147).[1]

Petitioners contend (Pet. 26-33) that a RICO conspiracy under 18 U.S.C. 1962(d) requires proof of an overt act. They also contend (Pet. 34-52) that the court below erred in ruling that a conspiracy "is presumed to exist until there has been an affirmative showing that it has terminated." Finally, they contend (Pet. 53-59) that the indictment on its face does not allege facts showing that it is not barred by the statute of limitations. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court.[2] The court of appeals' decision places petitioners in precisely the same position they would have occupied if the

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[1]Judge Clark concurred in the reversal but disagreed with the holding of the majority that it need not follow what it considered to be a dictum in *United States* v. *Phillips*, 664 F.2d 971, 1038 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982).

[2]It is now almost 30 months since the return of the indictment and over two years since the district court's dismissal order. Further interlocutory review at this time would cause additional delay in trial of the charges against petitioners.

district court had denied their motion to dismiss. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their conviction is affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1984

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[3]Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

DOJ-1984-04